147 U.S. 342

RECORD, CASE No 14,475.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 645.

JOHN L. SMITHMEYER AND PAUL J. PELZ, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED FEBRUARY 9, 1891.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 17, 1892.

1 *Petition.*

In the United States Court of Claims.

JOHN L. SMITHMEYER and PAUL J. PELZ
vs.
THE UNITED STATES. } No. 16432.

The amended petition of John L. Smithmeyer and Paul J. Pelz respectfully shows to the court—

That they are and for upwards of fifteen years last past have been copartners, doing business as architects in the city of Washington, in the District of Columbia, and elsewhere.

That as such they made and prepared the general plans and drawings for the Congressional Library building now in process of construction in the District of Columbia.

From the year 1873 to the year 1886 the said petitioners, at the request of the defendant, were engaged and employed in making plans and drawings for a building for the Library of Congress, and that in the year 1886 the said plans and drawings so made by the petitioners were delivered to the said defendant and accepted
2 and adopted by them, and that the said defendant thereafter used the same in the construction of said library building, and ever since have and still are using the same in the construction of said building.

Your petitioners further show that the cost of said building, when completed, will be the sum of seven million dollars ($7,000,000).

Your petitioners further show that the usual and customary charge by architects for the making of general drawings and plans for the construction of said building and the reasonable value of such service rendered by them as aforesaid is the sum of two and one-half (2½) per cent. upon the cost of said building.

That there is now due to your petitioners as aforesaid the sum of three (3) per centum upon the cost of said building, to wit, the sum of two hundred and ten thousand dollars ($210,000).

Your petitioners further show that no assignment or transfer of said claim or any part thereof or any interest therein has been made; that your petitioners are the owners thereof and are justly entitled to the amount hereinbefore stated from the United States, after allowing all just credits and offsets; that your petitioners have at all times borne true faith and allegiance and have not in any way voluntarily aided, abetted, or given encouragement to the rebellion against the United States, and the facts stated in this petition your petitioners believe to be true.

Your petitioners therefore ask for judgment in their favor against the United States for the sum of two hundred and ten thousand dollars ($210,000).

JAS. COLEMAN,
Attorney of Record for Petitioners.
JONES & VOORHEES,
Of Counsel.

3 DISTRICT OF COLUMBIA, } ss:
County of Washington, }

John L. Smithmeyer and Paul J. Pelz, being each for himself duly sworn, deposes and says that he has read the foregoing amended petition signed by them and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated to be on information and belief, and as to those matters he believes them to be true.

J. L. SMITHMEYER.
PAUL J. PELZ.

Sworn and subscribed before me this 17th day of April, A. D 1889.

[SEAL.] ALVYN W. COLEMAN,
Notary Public.

4 *General Traverse.*

In the Court of Claims of the United States, December Term, A. D. 1888.

JOHN J. SMITHMYER and PAUL J. PELZ } No. 16432.
vs.
THE UNITED STATES. }

And now comes the Attorney General, on behalf of the United States, and, answering the petition of the claimant- herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant- have at all times borne true faith and allegiance to the Government of the United States and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations and asks judgment accordingly.

ROBERT A. HOWARD,
Assistant Attorney General.

5 *Findings of Fact.*

Court of Claims.

JOHN L. SMITHMEYER and PAUL J. PELZ } No. 16432.
v.
THE UNITED STATES. }

Findings of fact.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

The claimants, John L. Smithmeyer and Paul J. Pelz, were at the times hereinafter mentioned copartners doing business as architects in the city of Washington.

II.

From the year 1873 until the 15th April, 1886, the claimants devoted their time as architects in the making of plans and drawings for a building for the Library of Congress. They acted under the direction and at the request of the commissions and committees of Congress mentioned in the following acts of Congress, viz: The commission created by the sundry civil appropriation act, March 3, 1873 (17 Stat. L., 510–513); the Joint Committee on the Library of Congress, sundry civil act, June 23, 1874 (18 Stat. L., 204, 226), and the legislative appropriation act, August 15, 1876 (19 Stat. L., 143, 168); the commission on the enlarged accommodation for the Library of Congress (act April 3, 1878, 20 Stat., 35); the joint select committee on additional accommodation for the Library of Congress, organized under the act June 8, 1880 (21 Stat. L., 165); deficiency act, March 3, 1881 (21 Stat. L., 414, 424), and the act April 15, 1886 (24 Stat. L., 12).

III.

Under the act 3d March, 1873, providing for "a plan for a new library building for a Library of Congress," the commission appointed thereunder published and issued the following prospectus or invitation to architects:

WASHINGTON, *August*, 1873.

To architects:

In accordance with the provisions of an act of Congress approved March 3, 1873, the undersigned hereby invite architectural plans or sketches (not including details or working plans) for a new building for the Library of Congress, to be drawn in accordance with limits and conditions which will be furnished to applicants. The sum of fifteen hundred dollars will be paid for such design as may be adjudged the best by the commission, one thousand dollars for the second best, and five hundred dollars to the third best, to be paid on the 31st of December, 1873.

6 The plans must be submitted on or before the 1st day of November next and addressed (prepaid) to the Librarian of Congress, Washington, D. C.

Commission:

Chairman of the Joint Committee on the Library.

Chairman of the Senate Committee on Public Buildings and Grounds.

Librarian of Congress.

IV.

During the ensuing thirteen years—that is to say, between March 3, 1873, and April 15, 1886—the claimants prepared for and submitted to different committees and commissions of Congress the following sets of plans and designs for a Library building, to wit:

(1.) In reply to the foregoing prospectus the claimants submitted a plan for a Library building in the Italian renaissance style of architecture to said commission. Said building, by the terms of the prospectus, was to be 270 by 340 feet. These plans consisted of one perspective, one front elevation, one side elevation, one first-story plan, one second-story plan, and one section. They were accepted by said commission in December, 1873, and claimants were awarded the first prize for excellence of design and were paid therefor a premium of $1,500. In that competition there were twenty-eight competitors, and prizes for first, second, and third best plans, respectively, of $1,500, $1,000, and $500.

(2.) Shortly afterward claimants, at the request of the chairman and members of the Committee on the Library, submitted a new design as a modification of the above-mentioned design, making a change of elevation and some changes of ground plan. This design consisted of a colored perspective, a front elevation, a portion of first-story plan, and a part of the second-story plan, five drawings in all.

(3.) About 1875, at the request of Senator Howe, chairman of the Joint Committee on the Library, claimants prepared a plan for a new Library building in the Gothic style of architecture upon an entirely new basis. This plan was for a building 463 feet 11½ inches by 332 feet 9 inches, and the series of drawings consisted of seven different sketches, but four of which were submitted to the committee.

(4.) Said Gothic plans were acceptable to the said committee, but at the session of Congress following, at the request of Senator Howe, chairman of said committee, claimants made modifications of the exterior design for said Gothic building, five in number, and these were submitted to his committee.

(5.) About 1877, at the request of Senator Howe, chairman of said committee, claimants prepared plans for a new Library building in the French renaissance style of architecture. These consisted of an elevation framed and colored and a pencil study of the front elevation. In general arrangement it corresponded with the Gothic design, which largely increased the capacity of the building over the premiated plan, with the exception that the first and second stories were interchanged. In all designs previous to this one the building consisted of a basement, a very tall first story, and a subordinate second story. At the time these plans were prepared, instead of the Capitol Hill site originally contemplated for the erection of the Library, the committee considered Judiciary square as a possible site, and, at the request of the committee, claimants prepared two
7 cross-sections of Judiciary square with the proposed building located, showing grades, sewers, etc. These plans were delivered to the said committee.

(6.) Claimants next prepared, at the request of the Joint Committee on the Library, a design for said building in the Romanesque style of architecture, with perspective elevations, that being a cheaper style of architecture, and permitting the use of coarser material than the Gothic. There were three drawings in all in this set of plans, and they were submitted to the said committee.

(7.) About 1879 claimants, at the request of said committee, prepared a design in the German renaissance style of architecture, with finished perspective and eight other drawings, consisting of front, rear, and side elevations, and a full set of plans of the different stories, together with a section showing the halls and reading-room, all of which were fully developed. The study of the reading-room was an entirely new and original design, and is the idea carried out in the plans finally adopted by the act of Congress of April 15, 1886, and as set forth in the report of the Chief of Engineers of the Army mentioned in the sundry civil act March 2, 1889 (25 Stat. L., 939, 966), as Exhibit D. There were also many changes in this set of plans, to wit, in the ground plans, and showing higher development and greater elaboration of original ideas and progress both in construction and light effect.

(8.) In 1880 claimants prepared full general drawings for a building in the Italian renaissance style of architecture, embodying all the improvements which had been made by the claimants since 1873. In this set of plans there were finished drawings numbering forty. These drawings consisted of a colored perspective, with a full set of ground plans, elevations, and sections, drawn on a large working scale one-eighth of an inch to the foot and one-fourth of an inch to the foot, showing the complete arrangements of the building. These plans, with exterior modified as set forth in paragraph 10 below, are the plans adopted by act of Congress of April 15, 1886, aforesaid, and they were readopted by the act of March 2, 1889, above cited. These plans, drawings, and designs, though prepared by the claimants' firm, were prepared in consequence of a request made to J. L. Smithmeyer, individually, by the Joint Select Committee on Additional Accommodations for the Library of Congress under the act 8th June, 1880, as more fully set forth in finding XII.

(9.) In 1882, at the request of the said committee, claimants redesigned and revised the Gothic plans above referred to in paragraphs 3 and 4 of this finding, making perspectives and front elevations. These revised plans were also turned over to the committee, and were adopted by the Senate in a bill passed by that body authorizing the construction of a Congressional Library, but which failed in the House.

(10.) The set of Italian renaissance plans, prepared in 1880 by the claimants, under instructions of the committee as aforesaid, was very severe and simple, and at the request of the said committee in 1885 or 1886 two new designs were prepared by the claimants in the same style of architecture and submitted to them. These exterior plans were more ornate than those submitted in 1880. They made no changes in the interior of the building, but were intended

to affect only the exterior, and consisted of perspectives.
8 These perspectives were made for the color effect of using different shades of material in the elevation. They are on a large scale, and carefully considered with reference to the architectural effect of the building.

V.

Claimants, in the year 1874, gave up their private business as architects, and from that time on until 1886 devoted themselves almost exclusively to the preparation of the plans above described, and up to the time of the commencement of this suit they had not regained their private business.

In 1882 one of the firm, Mr. Smithmeyer, traveled throughout this country and in Europe, visiting different library buildings in New York, Philadelphia, Boston, Baltimore, Liverpool, London, Paris, Brussels, Vienna, Berlin, Dresden, Leipsic, and Hanover, at the request of the said joint select committee, for the purpose of obtaining information in respect to the architecture of the great library buildings of the world.

VI.

When Congress, by the act 15th April, 1886, adopted the plans prepared by the claimants in the Italian renaissance style of architecture, as set forth in the preceding findings, the commission therein created was organized, and the work of constructing the Library building under and in accordance with the said plans so furnished by claimants and so adopted by Congress was commenced in the month of October, 1886.

Under the direction of the commission the foundation was laid for the rotunda and center building and for the curtains and corner pavilions of the west front, after the plan so adopted by Congress, while the cellar excavation and drainage system for the entire building has been completed. Some 29,000 cubic feet of cut granite for the cellar walls and piers, and also small quantities of terra-cotta pipe for flue linings and broken stone for concrete, had been delivered on the premises. Only about 23,000 cubic feet of the granite, however, had been accepted and paid for. A partial outfit of derricks, tools, implements, and other mechanical appliances had been collected, mainly by transfer from the completed building for the State, War, and Navy Departments, and a number of contracts were in force.

VII.

1. In accordance with the provisions of the sundry civil act, October 2, 1888 (25 Stat. L., 505–523), General Casey, Chief of Engineers, on October 3, 1888, assumed the superintendence of the new Library building.

In order to meet the requirements of said act, limiting the cost of said building to $4,000,000, General Casey so far changed the plans adopted by the act of April 15, 1886, as to reduce the cost within

this prescribed limit by cutting out the curtains connecting the wings with the central pavilion, and abutting the wings immediately thereupon, thus eliminating the courts formed by said curtains and the storage magazines contained therein, in this way decreasing the size of the proposed building and the amount of material required in its construction.

9 The plans so submitted are the plans marked A in the report of the Chief of Engineers and are the identical plans submitted by John L. Smithmeyer and adopted by Congress by act of April 15, 1886, with certain parts omitted as aforesaid.

2. Plans D, mentioned in said act of March 2, 1889, are the identical plans which Congress had formerly adopted by the abovementioned act of April 15, 1886, with certain interior parts of the building for book magazines omitted, which omitted parts are shown in the drawings appended to the said report of the Chief of Engineers.

VIII.

At the time when the act 15th April, 1886 (24 Stat. L, p. 12), authorized the construction of a library building "substantially according to the plan submitted to the joint select committee on additional accommodations for the Library of Congress by John L. Smithmeyer in the Italian renaissance style of architecture, with such modifications as may be found necessary or advantageous without materially increasing the cost of the building," no specifications fixing or designating the material of the building had been adopted, and until such specifications were adopted or the kind of material was in some way determined it was impossible to fix, except approximately, the amount of the estimated or anticipated cost of the building to be constructed.

The first estimate of the cost of the building authorized by the act April 15, 1886, made by any officer or agent of the Government was made by the Chief of Engineers of the Army in his report to the Speaker of the House of Representatives, bearing date December 1, 1888—that is to say, after the duty of constructing the building had been devolved upon him by the act 2d October, 1888 (25 Stat. L., pp. 505, 523). In this report he submitted to Congress an "estimate of cost of the original plan modified," which "estimate" amounted to $6,003,140.

This original plan "modified" was the plan of the claimants adopted by the act April 15, 1886, and the modification consisted in omitting about one-sixth of the finished interior, though retaining the external walls of the building as originally designed by the claimants. The portion so omitted would cost if built according to the original plan about $1,000,000 in addition to the estimate of $6,003,140 made by the Chief of Engineers for the modified plan. This modified plan to cost $6,003,140 was designated in the report to Congress as plan D and is the same plan adopted and authorized by the act 2d March, 1889 (25 Stat. L., pp. 939, 966).

But in 1884, while the claimants' plans were still under consideration in Congress, the claimant Smithmeyer had prepared a paper

entitled "Description of the plans for a new building for the Congressional Library," which was "ordered to be printed for the information of the members of the House April 3, 1884." The plans referred to in this document were the same plans then before Congress, subsequently designated as the plan of John L. Smithmeyer in the act of 1886, after which the building is now being constructed, and it was an accurate description of the said plan as then existing. It concluded with the following paragraph:

"The approximate estimate of the cost of completing this structure, made from the drawings on hand this date—*i. e.*, the plan adopted by the committee—in the Italian renaissance style of architecture, in stone and iron, will be $3,262,600, and the cost of completing such portions of the inside for occupation as will accommodate one million of books will be $2,323,600."

IX.

The usual and customary schedule of charges and the professional practice of architects, as prescribed by the American Institute of Architects (chartered under the laws of the State of New York, and of which both claimants are members), the Western Association of Architects, and other architectural societies, including the District of Columbia, and by the profession generally fixes the rates of compensation and rules governing the same as follows:

For full professional services (including supervision), 5 per centum upon the cost of the work.

The charge for partial service is as follows:

	Per cent.
Preliminary studies	1
Preliminary studies, general drawings, and specifications	2½
Preliminary studies, general drawings, specifications, and details	3½

For works that cost less than $10,000 or for monumental and decorative work and designs for furniture a special rate in excess of the above.

An additional charge to be made for alterations or additions in contracts or plans, which will be valued in proportion to the additional time and services employed.

Necessary traveling expenses to be paid by the client.

The architect's payments are successively due as his work is completed in the order of the above classifications.

Until an actual estimate is received the charges are based upon the proposed cost of the works and the payments are received as installments of the entire fee, which is based upon the actual cost.

These are the rates and rules established by the custom and usage of the profession and are never deviated from by architects in good standing, except under exceptional circumstances, and then only by a special and express contract.

The plans under which the building for the Library of Congress is being constructed are designed and intended for a monumental

building within the meaning of the paragraph of the foregoing schedule which prescribes additional rates for such plans.

In a number of cases the executive branch of the Government has employed architects at the rates prescribed by the foregoing schedule of the American Institute.

X.

The plans prepared and submitted by the claimants and accepted and so used by the Government in the construction of the building consisted of "preliminary sketches and general drawings" within the meaning of the classification in the schedule of the American Institute of Architects, and were so complete and perfect that any competent architect could take them and construct the contemplated building from them without the assistance or advice of the claimants.

For such preliminary studies and general drawings the rate of remuneration prescribed in the schedule set forth in the preceding finding is with specifications added 2½ per cent. upon the
11 cost or proposed cost of the work, but inasmuch as the kind of material and the style of finish for the Library building had never been fixed upon by Congress nor by any officer or agent of the Government no specifications were ever prepared by the claimants.

They consequently were unable to furnish the specifications and were relieved from the duty and labor of preparing them. The court finds $3,300 to be the reasonable value of the service of preparing specifications for this building from which the claimants were so relieved—that is to say, if the claimants are entitled to recover a commission of 2½ per cent. on the cost or proposed cost of the building, the sum of $3,300 represents the amount which may be deducted for specifications, which they were ready and willing to furnish, but which they did not in fact furnish to the defendants.

XI.

On the 1st October, 1886, the commission created by the act of 15th April, 1886, appointed the claimant John L. Smithmeyer architect of the Library building and fixed his compensation at $5,000 per annum. On the 13th November, 1886, the commission also appointed the claimant Paul J. Pelz principal draughtsman and fixed his compensation at $3,000 per annum. The appointments were in writing. Mr. Smithmeyer continued in the service of the defendants as architect of the Library building until October 3, 1888, when he was removed by the Chief of Engineers. Mr. Pelz is still employed. The claimants at the time of accepting such appointments did not notify either Congress or the commission that they intended to charge according to the schedule of the Institute for the plans furnished, nor did they so notify Congress or the commission before the work began on the building under the act of 1886, but had previously notified the chairman of the joint select committee that they intended to charge for the plans.

During the preceding twelve years—that is, say, from October, 1874, to April 15th, 1886—the claimants had given substantially their whole time to the service of the committees and commissions having charge of the subject of a library building, as is more particularly set forth in finding IV, and had also furnished the necessary draughtsmen and clerks and office room. It has been shown that the cost of draughtsmen, clerks, and office rent is usually about 50 per cent. of the gross receipts of an architect's business, and that the cost of plans and specifications in the office of the supervising architect of the Treasury is about 2½ per cent. of the cost of the building; but it has not been shown what were the expenditures of the claimants during the twelve years above mentioned further than that their office rent was $600 per annum, and that they ordinarily employed a number of clerks and draughtsmen whose compensation respectively ranged from $2 a day to $10 a day.

XII.

Immediately after the enactment of the act — 8th June, 1880, the joint select committee therein named selected Edward Clark, Alexander R. Esty, and the claimant John L. Smithmeyer as the three suitable persons contemplated by that act to determine
12 whether it was practicable and beneficial to provide additional library space in the Capitol or preferable to erect a separate building. The claimant's appointment was in the following words:

ROOMS OF THE JOINT SELECT COMMITTEE ON
ADDITIONAL ACCOMMODATIONS FOR THE
LIBRARY OF CONGRESS,
WASHINGTON, D. C., *June* 17, 1880.

John L. Smithmeyer, Esq., Washington, D. C.

SIR: The joint select committee contemplated by the act of Congress approved June 8, 1880 (a copy of which you will find inclosed), being duly organized, have directed me to notify you that you have been selected as one of the "three persons of suitable skill and attainments" provided for in said act to consider the questions therein named.

In making this communication to you the committee desire to call your attention to the provisions of the first section, relating to the examination of the Capitol building. This examination will be made in connection with your associates, Mr Edward Clark, architect of the Capitol, and Mr. Alexander R. Esty, of Boston.

It is not deemed necessary further to point out your duty in connection with the first section of said act, except to call your attention to the last sentence of the same. You will observe that provision is there made for a comparative examination and estimate of the advantages between library accommodations connected with the Capitol and the erection of a separate building for that purpose.

The object of the act is to empower "three persons of suitable

skill and attainments" on the subject of architecture to determine whether it is "practicable and beneficial" to provide additional accommodations for the library in connection with the Capitol building or whether it is preferable to go elsewhere and erect a separate building. If you and your associates find adversely to the idea of building on the present Capitol, then the committee desire you and each of you to submit plans, specifications, and estimates for a building at some eligible point in the city disconnected from the Capitol. In doing this the committee would advise that what is known as Judiciary square, and also the ground east of the present Capitol ground, be taken into consideration; but in designating these points the committee do not intend to be understood as excluding from your consideration other eligible sites that may occur to you.

If a new building should be decided on, it is the judgment of the committee that it should be not less than four hundred and fifty (450) feet in length and three hundred (300) feet in width; that it should be constructed of material as durable as the two wings of the Capitol, and that the interior should be brick, iron, or other material as nearly fire-proof as possible. As to the interior arrangement and the practicability of its future extension and improvement, it is the desire of the committee that you consult with the Librarian of Congress.

It is proper in this connection to call your attention especially to that part of section 1 which looks to the improvement of the "legislative halls," "the convenience of communication between them," "their better ventilation, light, and exposure to the open air." That subject you will consider in connection, however, with the primary purpose of this legislation, which is to provide a structure for the better accommodation of the Library of Congress and for its future wants.

The committee earnestly hope that you and your associates will be able to meet at an early day and proceed with the duties pointed out in this act. They hope to receive a preliminary report from you, if possible, as early as the 1st of October next, and it is their expectation that they will have such reports from you as will enable them to report to Congress upon its meeting in December next.

The committee have designated Mr. Edward Clark, architect of the Capitol, to act as chairman of the board when in consultation.

Very respectfully, yours, etc.,

D. W. VOORHEES, *Chairman.*

After receiving such appointment the claimant Smithmeyer entered upon and performed the duties therein indicated, both with regard to the adaptation of the Capitol to the purposes of a library and with regard to a separate building. In the discharge of these duties he produced, at the request of the joint select committee in 1880, a plan or plans for the alteration and enlargement of the Capitol and a plan for a building to be erected on Judiciary square, and
13 likewise the plan or plans described in finding IV, subdivision 8, for a separate building. The latter plan or plans

had inscribed upon them the name of Smithmeyer & Pelz, the claimants' firm name, and were prepared by the firm and at its cost, but were delivered to the committee by the claimant Smithmeyer, and the plan so delivered was the same adopted by and referred to in the act 15th April, 1886, as "the plan submitted to the joint select committee on additional accommodations for the library of Congress by John L. Smithmeyer." It was reported to Congress by the committee on the 14th January, 1881, restudied and great'y improved by the claimants, and was afterward modified at the request of the committee, as set forth in paragraph 10 of finding IV.

No express contract or agreement was entered into by the committee and the claimant, Smithmeyer, determining his compensation for his services generally or for preparing these specific plans; neither was any contract whatever entered into between the committee and the firm of Smithmeyer & Pelz.

XII.

The following statement sets forth all the payments made by the defendants to the claimants in and about the matter of preparing plans for a building for a Congressional Library, including a plan for the extension of the Capitol. With the exception of the first item of $1,500 all the payments were made to Smithmeyer alone for his individual services under the provisions of the act of June 8, 1880:

Statement of Payments.

From the $5,000 appropriation of March 3, 1873, "for a plan for a new building for a Library of Congress" (17 Stat. L., 513):

On Dec. 29, 1873, "for one set of designs for a new building for the Library of Congress, the amount of the first premium"	$1,500 00

From the appropriation of $8,000 made by the act of June 8, 1880 (21 Stat. L., 165), and the act of March 3, 1881 (*ib.*, 424), to be expended by the joint select committee created by said act of June 8, 1880, for the purposes therein mentioned:

On Aug. 10, 1880, "for services rendered the joint select committee to provide additional accommodations for the Library of Congress"	600 00
On Oct. 23, 1880, "for services rendered and drawings submitted" for said committee	500 00
On ——— —, ———, "for draughts of plans, etc., for Library building"	802 00
On Feb. 26, 1881, "for ground plans, elevations, and perspective drawings of the Capitol building as illustrating the preliminary report on the subject of extending it"	650 00

On March 30, 1881, for "professional services rendered"	650 00
On Nov. 2, 1881, for "labor on plans, sections, etc."	500 00
On Feb. 28, 1882, for "services rendered"	400 00
On June 29, 1882, for "professional services rendered—*i. e.*, estimates, drawings, etc., etc."	500 00
On Aug. 23, 1882, "for professional services up to date"	800 00
On January 20, 1883, "for services rendered as professional expert"	955 00
On January 4, 1883, "for drawings, photographs, copies of plans, and books purchased from C. Pulman, Esq., custodian of British museum"	40 88
Total as above	7,897 88

14 XIV.

The claimants have not submitted any demand to the Secretary of the Interior under the provisions of the act of October 2, 1888, above cited, for adjustment and determination; nor have they, or either of them, made any claim to the executive department in regard to any matter alleged in their petition looking to the payment of the fees or compensation demanded in this suit.

XV.

Since October, 1886, the Library building has been and still is in process of construction according to the plan designated by the act 15th April, 1886, modified by the act 2d March, 1889, as is more fully set forth in the preceding findings.

XVI.

The court finds the fair and reasonable value of the claimants' services in preparing the plans delivered to the joint select committee and reported to Congress on the 14th January, 1881, and which are now being used by the Government in the construction of a Library building to be ($48,000) forty-eight thousand dollars.

Conclusion of Law.

And upon the foregoing finding of facts the court decides as conclusion of law:

The claimants should recover of the defendants the value of their services *in quantum meruit*, to wit, as set forth in finding XVI, $48,000.

15 Court of Claims.

JOHN L. SMITHMEYER and PAUL J. PELZ, Claimants,
vs.
THE UNITED STATES. } No. 16432.

Additional Findings of Fact. (*Filed February* 3, 1891.)

I.

From the passage of the act 15th April, 1886, until October 1st, 1886, neither of the claimants were in any way in the employ of the defendants.

At this time the claimant Smithmeyer was employed. The following letter shows the extent of his employment:

WASHINGTON, D. C., *April* 19, 1887.

John L. Smithmeyer, Esq.

DEAR SIR: At a meeting of the commission held on Friday, Oct. 1st, 1886, you were appointed architect of the building for the accommodation of Congress at a compensation of $5,000 per annum.

Respectfully, L. Q. C. LAMAR,
Sect. of the Interior & Chairman
Cong. Library Commission.

16 Subsequently and on the 13th day of November, 1886, the commission employed the claimant Pelz as principal draftsman of the building, and agreed to pay him $3,000 per annum.

The claimants were not employed as a firm, and neither had any interest in the employment of the other or in the services to be rendered by the other or in the compensation to be paid for such services. Their employment related solely to service to be rendered by them in the future construction of the building and no other.

II.

Subsequent to the act of April 15th, 1886, the defendants paid for the services of draftsmen, computors, modelers, and experts of every kind, and also all expense for stationery, instruments, clerk hire, office rent, fuel, gas, and all other necessary expense which might be connected with an architect's office, and none of such service or expense was paid by claimants or either of them. From April, 1886, to the 30th of April, 1888, the commissioners paid for such expense the sum of $33,803.29.

III.

The acceptance of the salaries by Smithmeyer and by Pelz were the only acts, as far as appears, done by them or either of them, or agreements, express or implied, between them and the defendants or the commissioners relative to their compensation as architects either for preparing the plans or superintending the work.

IV.

17 In determining the value of claimants' services in preparing the plans accepted by the defendants and adopted by them and used by them in the construction of the Library building, no allowance has been made for service rendered after the 14th day of January, 1881, in restudying and improving such plans or in preparing the new designs for the exterior of said building, as set forth in paragraph 10, at finding four, and in the last paragraph at finding twelve.

V.

In fixing $48,000 as the fair and reasonable value of claimants' services in preparing said plans, accepted and adopted by the defendant, no allowance has been made for the expenses of the architect's office.

18 *Opinion.*

NOTT, *J.*, delivered the opinion of the court:

The outlines of this case are these:

In 1873 the Library commission, under the act 3 March, 1873 (17 Stat. L., p. 510, 513), by advertisement, invited plans for the Library of Congress and offered prizes. The claimants presented plans, were awarded the first prize, and paid the amount thereof, $1,500.

For the next thirteen years they spent nearly their entire time in preparing other and additional plans for the new National Library. The work was done at the request of and in close consultation with the committees and commissions of Congress. It seems to have been mutually understood that these committees and commissions, with one exception, had no authority to contract with the claimants or incur an obligation on the part of the Government, and the subject of compensation seems never to have been under consideration. Yet the work done by the claimants was immense, and the plans in response to repeated requests well nigh endless. There were designs for Italian renaissance; for Gothic; for improved Gothic; for French renaissance; for German renaissance; for Romanesque, and for revised Italian renaissance. There were designs for new interiors and for changed dimensions and for different materials. More than
19 one hundred finished plans were elaborated and delivered to the committees. The claimants also traveled through Europe and examined the great libraries of the old world and brought back new ideas, which were incorporated in new plans. Finally, on the part of the claimants, the most desirable elements of all the designs were incorporated into one, and on the part of the defendants the general plans to carry it into effect were reported by the joint select committee in 1881 and adopted by Congress in 1886.

In October, 1886, so soon as a plan was adopted and the erection of a building authorized, Mr. Smithmeyer, the senior member of the claimants' firm, was appointed architect at a salary of $5,000 a year and Mr. Pelz principal draughtsman at a salary of $3,000. Mr.

Smithmeyer held his place as architect of the building only two years; Mr. Pelz is still employed by the defendants.

Besides the services which the claimants rendered from 1873 to 1886, they likewise furnished to the committees and commissions of Congress all the designs, plans, estimates, draughtsmen, clerks, computers, and office room necessary and incidental to the work of an architect. It does not definitely appear how much money they thus expended for the benefit of the Government, but it does appear that the expenses of an architect's office are usually about 50 per cent. of the gross receipts, and, in confirmation thereof, that these expenditures in the office of the supervising architect of the Treasury are about 2½ per cent. of the cost of the buildings.

The demand which the claimants have accordingly presented by this suit is for a commission of 2½ per cent. "for preliminary studies, general drawings, and specifications," as prescribed by the schedule of charges of the American Institute of Architects, upon a building of the estimated cost of $7,000,000. It appears by the evidence in the case that the executive branch of the Government has repeatedly employed architects, who were compensated at the prescribed rates, and that at the present time the architect in charge of the new Naval Observatory is employed upon these terms. The claimants moreover rely upon the decision in Tilley *v.* County of Cook (103 U. S. R.), where the Supreme Court has said that if the architect's plan had been used evidence to show the usage would have been admissible, and has intimated that it would have been binding upon the county. In The District of Columbia *v.* Cluss (*ibid.*, 705) the court also said that "this was the ordinary rate of charge as compensation for similar services in the District."

At this point a question arises—much discussed in the course of the argument—as to the cost or estimated cost of the building upon which the percentage of the architect must rest. The building is not yet erected, its cost is still more or less uncertain, and many years will necessarily elapse before the actual cost will furnish a basis for calculation. The institute's schedule of charges is not confined to the actual cost of a building, but contemplates "proposed cost," "estimated cost," and "actual cost."

Ordinarily, when a person about to build goes to an architect he states an amount within which he wishes the ultimate cost to be brought, and almost invariably states it at less than the building he has in mind can be erected for. When the builder's estimates come in they vary the proposed cost, and, in the experience of most men, enlarge it. As the work progresses unforeseen contingencies arise and unplanned improvements are suggested until the actual cost, as a general rule, exceeds the estimated. Accordingly, the schedule of charges provides that—

Until an actual estimate is received, the charges are based upon the proposed cost of the work, and the payments are received as installments of the entire fee, which is based upon the actual cost.

In the case of this Government building there was no owner coming to the architect and stating the "proposed cost" and asking for a plan that would not much exceed it. The act of 1886, which

adopted the plan, fixed no limit to the cost. The act of 1888 limited the cost to $5,000,000, but abandoned the design of the claimants and contemplated the erection of a different and cheaper building. The act of 1889 returned to the claimants' plan, with an interior modification in the way of omissions, suggested by the Chief of Engineers, and limited the cost of the modified building to $6,500,000, including the two previous appropriations. The omitted portions of the interior are about one-sixth of the whole building, and the saving from the omitted parts is estimated at about $1,000,000. In the meanwhile an estimate on the claimants' plan as modified by the Chief of Engineers was made by that officer and submitted to Congress on the 1st December, 1888, whereby he places the cost of the proposed modified building at $6,003,140. It is therefore said that if the claimants are entitled to recover at the rate which usage has established as the compensation of architects, the estimated cost of the building may be taken at $7,000,000, and their percentage will amount to $175,000, less the cost of preparing the specifications, which was $3,300.

We come now to the defense which the counsel for the Government has presented.

Although the claimants worked upon designs for the Library of Congress during a period of thirteen years, and produced at the request of different committees and commissions twelve distinct and original sets of plans, only one design was adopted, and for that one their counsel insist the defendants have paid nothing.

By the act 8th June, 1880 (21 Stat. L., p. 165), the task of discovering a suitable design for the Library was assigned to what was termed in the act "a joint select committee," consisting of three members of each house, empowered "to employ as soon as may be, at the expense of the United States, three persons of suitable skill and attainments" to examine and consider the question of enlarging the Capitol and using it for the purposes of the Library.

The first section of the act is devoted to this idea of enlarging the Capitol, of improving it for legislative purposes, and of retaining the Library therein. The second section goes farther, and in express terms directs the joint select committee "at the same time to examine the question of a site outside the Capitol for the Library of Congress, and report to Congress what locations would be most suitable." The third appropriated $5,000 "for the purposes named in this act."

Three suitable persons were accordingly selected by the joint select committee, one of whom was the senior member of the claimants' firm. They reported adversely to using the Capitol for the purposes of a Library; but Mr. Smithmeyer, in addition to examining and reporting, also, at the request of the committee,
21 framed an elaborate architectural design for the extension of the building, the incorporation of the Library therein, and the improved ventilation of the halls of Congress.

He did two other things at the request of the committee; he visited Europe for the purpose of studying the great public libraries there, and he produced plans for two distinct buildings on two dif-

ferent sites as contemplated by the second section of the act. The plan for one of these sites, with forty elaborate drawings, embodying all of the improvements which had been made by the claimants since 1873, prepared by them and bearing their firm name of "Smithmeyer & Pelz, architects," was reported by the joint select committee to Congress on the 14th January, 1881.

In 1884, while the adoption of the claimants' plans was still a subject under consideration in Congress, Mr. Smithmeyer prepared an elaborate paper entitled "Description of the plans for a new building for the Congressional library," which was laid before Congress and "ordered to be printed for the information of members of the House, April 3, 1884." In this document, which was cited and quoted in subsequent debates in both houses, he estimated the cost of the proposed building to be erected, according to those identical plans, at $5,586,200. This was the first and only estimate of cost that had been made when the act of 1886 was passed. It is true that when the estimate was made the material of the building had not been determined, and that the estimate professes to be "approximate;" it is true that the Chief of Engineers has since then estimated that the cost of the building to be constructed will amount to $6,003,140, and that Congress has authorized the erection of a building at the cost of $6,500,000; but nevertheless the fact remains that when the act of 1886 became a law and when the construction of the building began the claimants' estimate was the only one that existed. The Chief of Engineers, indeed, estimated differently; but that was a transaction between principal and agent, between master and servant, occurring after the claimants' right of action was complete. Congress, too, authorized the erection of a more costly edifice, but the estimate of the Chief of Engineers and the act of 1889 were *inter partes;* the principal might overrule the estimate of the agent; the legislative power could repeal the act of 1889. The building is not yet erected, the actual cost is not yet determined, and the claimants' case therefore comes back to the fact that the only "proposed" or "estimated cost" of the building which existed when the plan was adopted and the Government's liability began was an estimate which they themselves had made and upon which Congress had acted, and that this estimate named the probable cost of $5,586,200. We must therefore conclude that if the claimants are entitled to recover a commission of 2½ per cent. the computation must be restricted to this estimate or proposed cost of $5,586,200, and cannot be made on the more probable but still uncertain cost of $7,000,000.

But it is not conceded that the defendants are liable for a commission on either of these amounts.

In dealing with this case it must be borne in mind always that there was no intrinsic property in the architect's design; it was not covered by letters patent; it was not protected by copyright. If an architect's plans are lost or stolen it may be that a court of equity will enjoin a person not entitled to them from using them, but if he voluntarily makes an unrestricted surrender of them he loses
22 all right or property in them, and when they are tendered to a party for inspection, then, by a usage so universal and

self-apparent that it cannot be questioned, it is mutually understood to be a tender of the services which produced the plans and are embodied in them. Accordingly in this case it must be held that when the claimants placed their plans before Congress their act meant a tender of the professional talent, skill, experience, study, effort, and labor which had produced the plans, and that the construction of a building according to their design would be in law, usage, and good conscience an acceptance of the service. The question therefore recurs, Upon what terms was this service to be paid for?

Speaking for myself alone, I am of the opinion that compensation should be measured by the general rule and usage which govern the compensation of the profession. I think that in legal effect the claimants proffered their plans to Congress through the intervention of the joint select committee for inspection, coupled nevertheless with the implied condition that if they were used their services should be paid for, as like services are paid for by other persons; that when Congress adopted the design by the act of 1886 the case reached the condition of Tilley *v.* County of Cook (*supra*), and that when the defendants proceeded to give effect to the statute by actually using the plans in the erection of a building after their design the case entered the third stage, in which, as the Supreme Court intimates, the legal liability of the employer at last becomes fixed and the obligations to pay for the service becomes legally binding. I think, too, that the decisions of the Supreme Court holding that the usage of architects extends to and is binding upon a body politic erecting a public building, Tilley *v.* County of Cook (*supra*), and that it has a recognized and established existence in the District of Columbia (District of Columbia *v.* Cluss, 103 U. S. R., 705), are authority for holding the usage obligatory upon the Government for a building erected in the city of Washington. The sum which would be recovered is large ($136,355), but the services embodied in these plans extended through the best part of these men's professional lives, and the risk which they ran was immense. From October, 1874, when they began to give their time to the congressional committees and commissions, until October, 1886, when the work of construction actually began, no liability had fallen upon the defendants, and no remuneration had been given to the claimants who had fought through these twelve years against the professional competition of the whole world. The undertaking was a game of chance in which they staked their business lives, and they having won the other party, which had the benefit of the exemption and of the competition and which chose to do business in that way, should not, in my judgment, grudge them the prize.

But the majority of the judges are of the opinion that the acts of the parties indicate that the services should be estimated according to the rule of *quantum meruit*, and not according to the schedule of charges of the Institute of Architects. According to that schedule the claimants would be entitled to 2½ per cent. up to the point where the suit brings their service and to another 2½ per cent. if that service should continue until the completion of the building. Instead of the latter, the defendants elected to give and the claim-

ants consented to take two annual salaries amounting to $8,000 a year as an equivalent for the percentage they would be en-
23 titled to according to the schedule. The claimants having thus "departed from the general rule of architects of measuring their compensation by the customary fees of their profession," as is insisted by the counsel for the Government, and having done this with no express agreement or reservation as to the preceding part of their service, the court is of the opinion that that part should be estimated according to the same rule which the parties have themselves adopted. Taking these facts of mutual acquiescence as elements for computing damages, and bearing in mind that a period of about six years existed between October, 1874, when the claimants began to give their entire time to what may be termed the evolution of their plans, and the 14th of January, 1881, when the plans were submitted to Congress, and remembering also that one of the claimants has received from the Government for other professional services connected with a library the sum of $4,600, the court finds as the value of perfecting the design and preparing the plans a like equivalent of six years' service at $8,000 a year and fixes the damages at $48,000.

The judgment of the court is that the claimants recover of the defendants the sum of ($48,000) forty-eight thousand dollars.

24 *Transcript of Judgment.*

In the Court of Claims.

JOHN L. SMITHMEYER and PAUL J. PELZ
vs.
THE UNITED STATES. } 16432.

At a Court of Claims held in the city of Washington on the 9th day of June, A. D. 1890, judgment was ordered to be entered up as follows:

The court, upon the consideration of the premises, find in favor of the claimant-, and do order, adjudge, and decree that the said John L. Smithmeyer and Paul J. Pelz do have and recover of and from the United States the sum of forty-eight thousand dollars ($48,000).

25 *Appeal.*

In the Court of Claims.

JOHN L. SMITHMEYER and PAUL J. PELZ
v.
THE UNITED STATES. } 16432.

And now come the claimants, by their attorney of record, an- pray an appeal from the judgment rendered by this court on the 9th day of June, 1890, to the Supreme Court of the United States.

JAMES COLEMAN,
Attorney of Record.

Filed July 9, 1890.

A. H.

Allowed.

WILLIAM A. RICHARDSON,
Chief Justice.

26 *Certificate.*

In the Court of Claims.

JOHN L. SMITHMEYER and PAUL J. PELZ
vs.
THE UNITED STATES. } No. 16432.

I, Archibald Hopkins, chief clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the opinion of the court and its judgment, and of the application for and allowance of an appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 11th day of July, 1890.

Seal Court of Claims.

ARCHIBALD HOPKINS,
Chief Clerk Court of Claims.

Endorsed on cover: Case No. 14,475. Court of Claims. No. 645. John L. Smithmeyer and Paul J. Pelz, appellants, *vs.* The United States. Filed February 9, 1891.

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

JOHN L. SMITHMEYER and PAUL J. PELZ,
Appellants,
vs.
THE UNITED STATES.

No. 645.

On Appeal from the United States Court of Claims.

BRIEF FOR APPELLANTS.

JOHN PAUL JONES,
REESE H. VOORHEES,
For Appellants.

Press of McGILL & WALLACE, Washington, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

SMITHMEYER AND PELZ, Appellants,
vs.
THE UNITED STATES, Appellees.
No. 645.

On Appeal from the United States Court of Claims.

BRIEF FOR APPELLANTS.

[*Submitted under the 20th Rule.*]

STATEMENT.

This case comes before the court on appeal, on behalf of claimants, from a judgment rendered in their favor in the Court of Claims, June 9th, 1890.

The facts are as follows:

The claimants, John L. Smithmeyer and Paul J. Pelz, were, from 1873 to the bringing of this action, co-partners doing business as architects under the firm name of Smithmeyer & Pelz, in the city of Washington, District of Columbia. (Finding I, Record, p. 3.)

In 1873, by act of Congress of March 3d, a commission was created charged with the selection of a plan for a building for a Library of Congress.

In August of that year the commission published an invitation "to architects," that is to the profession at large, to submit plans for a library building in competition for three prizes to be awarded for superior excellence of design, namely: $1,500 for the first prize, $1,000 for the second prize, and $500 for the third prize. There were twenty-eight competitors, including the claimants who were awarded and paid the first prize, and the second and third prizes were awarded to the designers of plans of less merit than those of the claimants. (Findings III and IV, par. 1, Record, pp. 3, 4.)

None of these plans upon which prizes were awarded were purchased or used by the defendants.

In 1874, and from time to time thereafter until 1886, the claimants at the request and under the direction of various committees and commissions created by Congress for the purpose of having plans for a library building prepared for the benefit of the defendants, devoted themselves to rendering the services requested of them to the end that a plan might be prepared which would be satisfactory to defendants. (Finding IV, Record, pp. 4, 5.)

By act of Congress, April 15, 1886, the defendants declared their satisfaction with one of the many plans thus procured from claimants, directed that the building be erected according to the plans approved, and created a commission to superintend the construction of the building upon the plans so accepted. (Finding IV, par. 8, and Finding VIII, first par., Record, pp. 5, 7.)

A site was at once procured by the commission, and the use of the plans begun. (Act April 15, 1886, Appx., pp. 1, 2, 3.)

On the 1st of October, 1886, Mr. Smithmeyer was appointed architect of the construction of the building.

Work went on according to the firm's plans, and on the following 13th of November, Mr. Pelz was appointed "principal draughtsman." (Additional Finding I, Record, p. 14.)

Between the 15th of April, 1886, when the completed plans were accepted and directed to be immediately used, and the following October, neither of the claimants was in any way in the employ of the defendants in connection with the Library building. (Additional Finding, I, Record, p. 14.)

On October 2, 1888, up to which time the building had been constructed according to claimants' plans, by act of Congress the defendants abolished the commission created in 1886, directed that the building should not be erected according to those plans, and placed the construction of the building and the procurement of other plans under the full control of the Chief of Engineers of the Army. (Finding VII, Record, p. 6). On the next day, October 3d, the Chief of Engineers of the Army discharged Mr. Smithmeyer from his position in connection with the construction of the building. Mr. Pelz was retained as "principal draughtsman." (Finding XI, Record, p. 9.)

The Chief of Engineers of the Army, in the procurement of other plans, merely cut out certain parts of the claimants' plans, rendering the proposed building smaller, and therefore less expensive. (Finding VII, Record, pp. 6, 7.)

The plans so substituted were not approved by the defendants, and by act of Congress, March 2, 1889, the Chief of Engineers of the Army was directed to continue the construction of the building according to the plans of the claimants, certain storage magazines for books, contemplated in them, to be left unbuilt. (Findings VII and VIII, Record, p. 7.)

The building is now being constructed according to the claimants' plans. (Finding XV, Record, p. 13.)

From 1873 to 1886 the claimants bore all of the office expenses of an architect's business, which expenses amount to one-half of an architect's gross receipts. (Finding XI, Record, p. 10.)

No specific price was ever expressly agreed upon by the claimants and defendants, or by either, for the plans or for the services entering into their preparation (last par., Finding XII, and addi. Finding III, Record, pp. 11, 14), and they have not been paid any compensation of any character whatsoever for the plans accepted and used by the defendants, or for the services which prepared them. (Finding XIII, (XII ?) Record, p. 12.)

The court below found the claimants entitled to recover from the defendants upon an implied contract to pay for the services or plans. It further held that the claimants were not entitled to that value of their plans which is fixed by the universal usage of the profession of architects, but were entitled in *quantum meruit* to a lesser amount. Usage fixes the value of the plans at $171,700. The court below rendered judgment for $48,000. (Rec., p. 20.)

ASSIGNMENT OF ERRORS.

I.

The Court of Claims erred in holding that the value of the claimants' plans or services should be estimated according to the rule of *quantum meruit.*

II.

The Court of Claims erred in holding that the claimants are not entitled to be paid for their plans or services according to the rates established by the general usage of the architects' profession throughout this country.

III.

The Court of Claims erred in holding that the fair and reasonable value of the claimants' plans or services is $48,000.

IV.

The Court of Claims erred in not holding that the value of the claimants' plans or services established by the general usage of the architects' profession throughout this country, is the fair and reasonable value of such plans or services.

V.

The Court of Claims erred in not holding that $171,700 is the fair and reasonable value of the claimants' plans or services.

VI.

The Court of Claims erred in holding that, if the claimants are entitled to 2½ per cent. upon the cost of the building, $5,586,200 is the amount of that cost upon which such percentage should be calculated.

VII.

If this court should hold the proper measure of the value of the claimants' plans to be other than that established by the usage of the profession, and that they should recover in *quantum meruit*, the Court of Claims erred in holding that the claimants are entitled to only $48,000, instead of that amount and an additional $48,000 for their office expenses; in all, $96,000.

VIII.

The Court of Claims erred in holding that the claimants are entitled to $48,000 as the value of their plans or the services entering into their preparation, instead of $171,700.

BRIEF.

The Liability of Defendants.

In all matters of contract there is an absolute equality of right between the Government and a private citizen, and the one is bound by the same rules of law and equity, the same rules of evidence, and the same presumptions of law and of fact as the other.

U. S. *v.* Smoot, 15 Wall., 36;
Cook *v.* U. S., 91 U. S., 389;
C. & N. W. R. R. Co. *v.* U. S., 104 U. S., 68.

The defendants directed the claimants to prepare the plans through the agency of committees and commissions authorized to procure them to be made, as set forth in the following finding:

"From the year 1873 until the month of October, 1886, the claimants devoted their time as architects in the making of plans and drawings for a building for the Library of Congress. They acted under the direction and at the request of the commissions and committees of Congress mentioned in the following acts of Congress, viz.: the commission created by the *Sundry Civil Appropriation Act, March 3, 1873* (17 Stat. L., 510–513); the Joint Committee on the Library of Congress, *Sundry Civil Act, June 23, 1874* (18 Stat. L., 204, 226), and the *Legislative Appropriation Act, August 15, 1876* (19 Stat. L., 143, 168); the Commission on the Enlarged Accommodation for the Library of Congress (*Act April 3, 1878*, 20 Stat., 35); the Joint Select Committee on Additional Accommodation for the Library of Congress, organized under the *Act June 8, 1880* (21 Stat. L., 165), *Deficiency Act, March 3, 1881* (21 Stat. L., 414, 424), and the *Act April 15, 1886* (24 Stat. L., 12)." (Finding II, Record, p. 3.)

The defendants reserved to themselves, in their dealings with the claimants through this agency, the right to accept or reject such plans as were prepared, and the claimants took all the risks of failing to prepare plans to

the satisfaction of the defendants and of their consequent ultimate rejection.

The *immensity* of the labor done is shown in Finding IV. (Record, pp. 4, 5, 6.)

The acceptance of the plans by the defendants, by the act of Congress April 15th, 1886 (Appendix, p.—), and of the benefits of the services directed to be performed by the defendants' agents, and the enjoyment of those benefits created an implied contract on the part of the defendants to pay for the plans thus accepted and used, dating from 1874, when the defendants' agents directed their preparation.

"If I employ a person to do any business for me, or perform any work, the law implies that I undertook or contracted to pay him as much as his labor deserves. If I take up wares from a tradesman, without any agreement of price, the law concludes that I contracted to pay their *real value*." (2 Blackstone, Comm., 443.)

The liability of the *Government* to pay either for private services used and enjoyed, or for private property taken and put to public purposes, grows also out of constitutional rights in the citizen which have been repeatedly enforced by this court.

The United States *v.* G. F. Mnfg. Co., 112 U. S., 645;

United States *v.* Russell, 13 Wall., 630;

Pumpelly *v.* Green Bay and Miss. Canal Co., 13 Wall., 166;

U. S. *v.* Russell, 13 Wall., 623;

Hollister *v.* Benedict and Burnham Manufacturing Co., 113 U. S., 67;

U. S. *v.* Gill, 20 Wall., 517.

By the act of October 2d, 1888, entrusting the construction of the building by other plans to the Chief of Engineers of the Army, the defendants admitted their

liability to the claimants for the *value* of their plans, as follows:

"And all loss or damage occasioned thereby or arising under said contracts, together with the *value* of the plan for a library building submitted to the Joint Select Committe on Additional Accommodations for the Library of Congress by John L. Smithmeyer, in the Italian renaissance style of architecture, may be adjusted and determined by the Secretary of the Interior, to be paid out of the sums heretofore or hereby appropriated." (25 Stat. L., p. 523, Appendix, pp. 4, 5.)

This act also stopped the use of the claimant's plans, but Congress resumed their use by act of March 2, 1889, (25 Stat., p. 966, Appendix, p. 5), and no other plans than theirs have been used at any time in the construction of the building. (Findings VIII and XV, Record, pp. 7, 13.)

The Value of the Plans.

The liability to pay being fixed, what is the *real value* of the plans for which the defendants are indebted?

We fix the compensation to which the claimants are entitled by the rate of charge proven by members of the profession to be that established by universal usage.

There can be no better evidence of value of any service or property than the evidence of what is usually asked by those selling service or property of a similar kind, and of what is usually paid by those who buy.

The usage of a trade or profession is always to be resorted to to explain the meaning of a contract if it be dubious or silent in regard to the point to which the usage applies, and such usage becomes a part of the contract.

Renner *v.* The Bank of Columbia, 9 Wheat., 581;
1 Greenleaf Ev., secs. 292–294;
Hutchinson *v.* Totham, L. R., 8 C. P., 482;
Field *v.* Lelean, 30 L. J. Exch., 168;
Robinson *v.* U. S., 13 Wall., 363.

In the case of Vilas *v.* Downs (21 Vt., 419), which was a suit for compensation for legal services, the court said:

"For the purpose of aiding in the determination of the value of the plaintiff's services we think it was proper for the auditors to receive evidence of the usual prices charged and received for similar services to those rendered by the plaintiff for the defendant by other men of the same profession with the plaintiff in the same vicinity and in the same courts. * * *

"In all ordinary cases in determining the value of services evidence is received of what is commonly and usually charged by other persons for the like services, and in determining the value of goods evidence is received of what similar articles are bought and sold for, in order to ascertain their value in market. * * * Where a lawyer is employed by a person who has full knowledge of his rate of charges, without stipulation at all as to the price, it might fairly be inferred, perhaps, that he expected to pay at such rates and be equivalent to an express contract to pay them."

In Fay *v.* Shaw (32 Ill., 295), the court said:

"Parties are presumed to contract with reference to the usage of the trade or business in question, if there is nothing in the agreement to exclude the inference."

The *sovereignty* of the defendants can in no way relieve them from the application of the rule. In addition to the cases bearing on this point (*supra*), which put the United States on a common plane with the private litigant, is the following in particular:*

Both of the claimants are members of the American Institute of Architects (chartered under the laws of the State of New York) which prescribes the schedule of charges, being the rate endorsed by the usage of the whole profession. (Finding IX, Record, p. 8.)

The bar of Lower Canada is a body of legal practitioners incorporated by the act of the Canadian Parliament, and in a suit against the Queen for legal services upon an

*See also—

2 Story on Const., sec. 1330;
Robinson *v.* U. S. (*supra*);
U. S. *v.* Arredondo, 6 Pet., 715;
U. S. *v.* McDaniel, 7 Pet., 1;
U. S. *v.* Bank of the Metropolis, 15 Pet., 377;
U. S. *v.* Barker, 12 Wheat., 559;
The Bank of the United States *v.* The United

implied contract, it was said (9 Appeal Cases, P. C., 83, 84, The Queen *v.* Doutre):

"The respondent is a member of the Quebec section of the bar of Lower Canada, and it was in that capacity that he was retained by the government as one of their counsel before the Fisheries Commission. * * *

"The retaining letter of the 1st of October, 1875, makes no mention of fees, and their lordships are accordingly of opinion that it must be held to have been an implied condition of the employment thereby offered that the respondent was to be remunerated for his services upon the same terms on which these services were rendered to clients in Quebec. * * *

"When an advocate or other skilled practitioner is by law and the custom of his profession entitled to claim and recover payment for his professional work, those who engage his services must, in the absence of any stipulation to the contrary, express or implied, be held to have employed him upon the usual terms according to which such services are rendered. That is the implied condition of every contract of employment which is silent as to remuneration; and it is a condition dependent upon the professional status of the person employed, and not upon the law of the place where his services are to be given, so long as he is employed in his professional capacity."

Evidence of usage is competent to prove what is a *reasonable* compensation.

Bodfish *v.* Fox, 23 Me., 90.

It is proper to give due weight to the extraordinary artistic skill and inventive genius embodied in the plans by the claimants, at least in applying the *ordinary* rate of compensation.

"The compensation is to be graduated with proper reference to the nature of the business performed by the counsel for his client and his standing in the profession for learning and skill, whereby the value of this service is enhanced to his client, and evidence of usage is admissible to show what is the rule of compensation for similar services to those sued for." (Weeks on Attorneys at Law, p. 573.)

"Four things are to be regarded: first, the greatness of the cause; second, the pains of the sergeant; third, his worth, as his learning, eloquence, and gift; fourth, the usage of the court." (Mirror, chap. 2, sec. 5.)

In Renner *v.* The Bank of Columbia (*supra*) it is said:

"The true test of a commercial usage is its having existed long enough to have become generally known, and to warrant a presumption that contracts are made in reference to it."

The usage of the architectural profession prescribes as the real value of the claimants' plans 2½ per cent. upon the actual estimate of the cost of the building. (Findings IX, X, Record pp. 8, 9.)

That this usage is well known and reasonable is shown by the fact that it is followed "by the profession generally," and that it is "never deviated from by architects in good standing except under exceptional circumstances;" that is, that the buyer throughout the country never buys at less than the customary rate "except under exceptional circumstances." (Finding IX, Record p. 8.)

The defendants, as buyers of plans, are peculiarly unable to question the reasonableness of the rate of charge established by usage, for the reason that it costs them in the way of the expenses of running the office of the Supervising Architect of the Treasury, to have plans for public buildings prepared, just the amount charged, according to the schedule, by private architects. (Finding XI, Record, p. 10.) If the plans for the library had been prepared in the Supervising Architect's office, the cost, exclusive of the architect's services, would have been 2½ per cent. on the cost of the building, and the Government would not have had over one hundred plans to choose from, would not have had the benefit of the competition, and would not have had the benefit of the results of the

thirteen years of study which have made the growing building the most perfect piece of library architecture in the world.

The usage prevails in the District of Columbia. (Finding IX, Record p. 8.) In the case of D. C. *v.* Cluss (103 U. S., 705) this court declared that five per cent. upon the cost of the building for full architectural services to the completion of the building "was the ordinary rate of charge as compensation for similar services in the District." This is the rate for full services established by the usage of the profession and published in the architects' schedule of charges. (Finding IX, Record p. 8.)

Not only does the usage control in the city of Washington where the contract was made, but the defendants had *actual* knowledge of it from many prior dealings with architects, in which the defendants paid for services and plans at the rates established by the general usage of the profession (Finding IX), and "at the present time the architect in charge of the new Naval Observatory is employed upon these terms." (Opinion, Record, p. 16.)

Finally, this particular usage relative to the charges of architects has passed under judicial scrutiny and has been declared to be one proper for the courts to enforce. (See D. C. *v.* Cluss, *supra.*)

In Legge *v.* Girardi (5 West. Rep., 94) judgment was rendered in favor of the plaintiff architect for 3½ per cent. upon the cost of the building, as compensation for preliminary studies, general drawings, specifications and details, or full architectural service less superintendence. The value of the service rendered was proven by other members of the profession or experts. Reference to the schedule shows the percentage for which judgment was rendered to be that established by the usage of the profession. (Finding IX, Record, p. 8.)

But in the case of Tilley *v.* The City of Chicago (103 U. S., 155), this court held that evidence of this particu-

lar usage was competent to fix the value of architectural services or plans, where such plans had been prepared under a contract which was silent as to the price.

Tilley submitted plans in competition for the construction of a court-house and city hall for the city of Chicago. His plans were awarded only the third prize of $1,000, which he was paid, but the same plans were subsequently, by resolution of the city council, selected and adopted as the plan after which to build such court-house and city hall. This resolution was reconsidered, however, and the building was not constructed according to these plans.

Upon the trial the plaintiff offered to prove the value of his plans according to the custom and usage prevailing among architects. All this evidence was objected to by the defendants and the objection sustained, because the facts as stated did not constitute a contract, express or implied.

In its opinion this court said:

"If the plaintiff in error had offered to show that after the passage of the resolution by which his plan was accepted *the defendants had erected their building according to his plans, then the evidence of the custom would have been pertinent;* but he made no such offer, and it is to be presumed no such fact existed. The evidence of this custom was, therefore, properly excluded."

The case at bar has all the elements of contract lacking in the Tilley case. The chief difference, however, lies in the use and enjoyment of the benefits of the plans by the defendants in the case at bar.

Granting a contract in the Tilley case, the claimants' case is still a stronger one. They were not even paid a prize for superior excellence of design upon the plans involved in this suit. The prize awarded them was on the plans presented in the general competition in 1873. The plans finally accepted and used were other plans subse-

quently prepared at the defendant's requests. (Findings IV, V, Record, pp. 4, 5, 6.)

The actual estimate of the cost of the building, prepared under authority of act of Congress, is $7,000,000. (Finding, VIII, Record, p. 7, and pp. 31–38, *infra.*) At the usual rate of 2½ per cent., the claimants are entitled to $175,000. The court below, however, found that the claimants were unable to prepare the specifications, compensation for which is covered by the 2½ per cent., owing to the failure of the defendants to determine upon the kind of material and the style of finish for the building, though claimants were ready and willing to prepare them, and that they were therefore relieved of the duty of preparing them. They found, however, that the cost to the defendants of having the specifications made would be $3,300.

Therefore the claimants' recovery should be $175,000, the full 2½ per cent., less $3,300, or $171,700.

Errors of the Court Below.

The court below, in a divided opinion, took a different view of this case and adjudged the claimants not to be entitled to such value of their plans as is universally declared to be just and reasonable by the usage of the profession.

The court did, however, find as a fact that the claimants' plans were in all respects at least sufficiently meritorious to make the usage of the profession applicable to them.

"The plans prepared and submitted by the claimants and accepted and so used by the Government in the construction of the building consisted of 'preliminary sketches and general drawings' within the meaning of the classification in the schedule of the American Institute of Architects, and were so complete and perfect that any competent architect could take them and construct the contemplated building from them without the assistance or advice of the claimants.

"For *such preliminary studies and general drawings* the rate of remuneration prescribed in the schedule set forth in the preceding finding is, with specifications added, 2½ per cent. upon the cost *or proposed cost of the work.*" (Finding X, Record, p. 9.)

Not only did the court thus find that by the usage of the profession these particular plans were worth 2½ per cent. on the cost of the building, but they further found that—

"The plans under which the building for the Library of Congress is being constructed are designed and intended for a monumental building within the meaning of the paragraph of the foregoing schedule which prescribes *additional rates* for *such plans.*" (Finding IX, Record, p. 8.)

But these plans far exceeded in merit the average for which the universal usage has established, as the reasonable value, the schedule rates.

The claimants for thirteen years had devoted their time, labor, money, and genius, artistic and inventive, to the attainment of an unsurpassable superiority of excellence (Findings IV and V, Record, pp. 4, 5, 6), and success had crowned their ambition and their patient and extraordinary efforts.

They met and conquered the competition of the world. In the public contest in 1873 for the prizes to be awarded for superior excellence of design, they carried off the first prize from twenty-seven competitors. (Finding IV, par. 1, Record, p. 4.)

In 1874, they began the elaboration of another plan in the same style of architecture, and embodied in it all the advantageous results of all their labors, thought, expenditures of time and money, and travel and study of other buildings, from 1874 until 1886. (Findings IV and V, Record, pp. 4, 5, 6.)

The various findings of fact bearing on the evolution of this plan may be summarized in the language of the court below as follows:

"In 1873, the Library Commission, under the *Act 3 March, 1873* (17 Stat. L., p. 510, 513), by advertisement, invited plans for the Library of Congress and offered prizes. The claimants presented plans, were awarded the first prize, and paid the amount thereof, $1,500.

"For the next thirteen years they spent nearly their entire time in preparing other and additional plans for the new National Library. The work was done at the request of, and in close consultation with the committees and commissions of Congress. It seems to have been mutually understood that these committees and commissions, with one exception, had no authority to contract with the claimants or incur an obligation on the part of the Government, and the subject of compensation seems never to have been under consideration. Yet the work done by the claimants was immense, and the plans in response to repeated requests well nigh endless. There were designs for Italian renaissance; for gothic; for improved gothic; for French renaissance; for German renaissance; for Romanesque, and for revised Italian renaissance. There were designs for new interiors, and for changed dimensions, and for different materials. More than one hundred finished plans were elaborated and delivered to the committees. The claimants also traveled through Europe and examined the great libraries of the old world and brought back new ideas which were incorporated in new plans. Finally, on the part of the claimants, the most desirable elements of all the designs were incorporated into one, and on the part of the defendants, the general plans to carry it into effect were reported by the Joint Select Committee in 1881, and adopted by Congress in 1886." (Record, p. 15.)

It would have been odd had Congress failed to profit by the thirteen years of study by two able men to meet in perfection the peculiar and positive needs of a National Library Building.

In 1886, Congress, by directing the building to be erected according to the claimants' plans, after the many years of scrutiny by and exposure to the criticisms of the various committees ~~for so many years~~, put the stamp of extraordinary merit upon them.

In 1888, Congress reconsidered its action in 1886 and rejected the plans. Their great merit but became enhanced when it was sought to substitute others. Another man was competent to superintend the construction, but another man was *not* competent to create superior plans, and Congress was compelled to again direct that the building be erected by them. (Findings VII, VIII, Record, pp. 6, 7.)

Notwithstanding the fact that the reasonableness of the schedule rate of charge is not questioned by the court below; notwithstanding the reasonableness affixed to it by universal usage and the acquiescence in its fairness by the Government itself by dealings on that basis, and notwithstanding the enormous labor done, expenditures made, sacrifices endured, terrible risks incurred, and, above all, the extraordinary merit of their work and the great benefits enjoyed by the Government, the court below finds as a fact:

"The fair and reasonable value of the claimants services in preparing the plans delivered to the Joint Select Committee and reported to Congress on the 14th January, 1881, and which are now being used by the Government in the construction of a library building, to be (48,000) forty-eight thousand dollars." (Finding XVI, Record, 13.)

And as a conclusion of law holds that—

"The claimants should recover of the defendants the value of their services in *quantum meruit*, to wit, as set forth in finding XVI, $48,000. (*Ibid.*)

Finding XVI we submit to be in irreconcilable conflict with all of the other findings in the case, and the con-

clusion of law to be unsupported by the facts or any legal principle known to the books.

We must resort to the opinion of the court for some light upon this finding and conclusion of law. The facts on which they are based are these:

On the 1st of October, 1886, the Congressional Library Commission appointed Mr. Smithmeyer architect of the proposed building for the purpose of superintending its construction, at a salary of $5,000 per annum. (Additional Finding I, Record, p. 14.)

On the 13th day of November, 1886, the commission appointed Mr. Pelz "principal draughtsman" at a salary of $3,000 per annum. (*Ibid.*)

Upon these facts the court explains Finding XVI and their judgment as follows:

"But the majority of the judges are of the opinion that the *acts* of the parties indicate that the services should be estimated according to the rule of *quantum meruit*, and not according to the schedule of charges of the Institute of Architects. According to that schedule the claimants would be entitled to 2½ per cent. up to the point where the suit brings their services, and to another 2½ per cent. if that service should continue until the completion of the building." (Record, p. 19.)

They then state that the claimants accepted two salaries amounting to $8,000 in lieu of the latter 2½ per cent.; that is the 2½ per cent. to which, under the schedule, they would have been entitled for their services had they been employed to carry the plans into execution by superintending the construction of the building according to them to its completion.

The court then says:

"The claimants having thus 'departed from the general rule of architects of measuring their compensation by the customary fees of their profession' * * * with no express agreement or reservation as to the preceding

*Authority for this is found in the United States *v.* Clark (96 U. S., 37).

Finding XVI, as is shown in the opinion, is based upon facts contained in other findings made by the court. The facts so relied upon do not support Finding XVI.

In the case just cited the court said:

"It is manifest that before we can do this, we must also hold that where the court has found in due form, and presented to us one of those ultimate facts which by our rule they are required to find, and which is a fact necessary to the judgment of the court, and has at the same time presented as part of their finding of facts *what they show to be all the evidence on which that fact was found*, we can look at both findings to see whether that evidence was competent proof of that fact."

part of their service, the court is of the opinion that that part should be estimated according to the same rule which the parties themselves adopted." (Record, p. 20.)

They hold that it took the claimants about six years, from October, 1874, to January 14, 1881, to prepare the plans which the Government is using, "and remembering also that *one* of the claimants has received from the Government for *other* professional services connected with *a* library the sum of $4,600," they thus finally conclude that the claimants are entitled to $8,000 for six years, or $48,000.

Why the item of $4,600 is made to figure as a factor in determining the measure of damages, or what purpose it served, having been inserted here, we can not explain. The court says it was paid to *one* of the claimants for *other* services, and it does not seem to have been used in calculating the value of the plans even though inserted as a factor. The *other* services, which were done by Mr. Smithmeyer individually, and were paid for, are set forth in Findings XII and XIII. We admit that the mention of this item tends to make it appear that the claimants, with the amount of the judgment added, are getting a large sum of money from the defendants, but we question the materiality of this fact. We may eliminate this $4,600 from further consideration with the remark that the fact that Mr. Smithmeyer on a former occasion was fortunate enough to get what he had earned, does not, by any rule known to us, become a reason why for *other* services his *firm* should receive *less* than the *usual* compensation.

In regard to the rates established by universal usage, the court in, Finding IX, states:

"These are the rates and rules established by the custom and usage of the profession, and are *never* deviated from by architects in good standing, except under *exceptional circumstances, and then only by a special and express contract.*" (Record, p. 8.)

It must, therefore, be presumed that the court below considered that the "acts of the parties" in regard to the two salaries for future services, constituted an express contract on the part of the claimants to deviate from the usage of the profession in regard to their plans or their past services in preparing them.

That this conclusion is erroneous and untenable is, we submit, clear.

The Acts of the Parties.

a. OF THE DEFENDANTS.

1. The plans were a complete and perfect work on April 15, 1886 (Finding X, Record, p. 9), at which time they were in the possession of the defendants (Finding VIII, Record, p. 7) and at which time the defendants authorized their agents (the Cong. Library Commission created by the act of that date, Appendix, p. 1) to construct the building by them. At that time any other architect could have superintended the construction of the building according to these plans (Finding X, Record, p. 9). After the acceptance of the plans by the act of April 15th, 1886, the claimants ceased rendering service of any character to the defendants, and were in no way in their employ for six months. (Additional Finding I, Record, p. 14.)

The act of April 15th, 1886, directing the commission to erect the building by claimants' plans, did not direct that the firm or either of its members should be further employed, but left it to the discretion of the commission to employ the firm, either of the firm, *or any other architect* to do the distinct and separate service necessary to be done in order to construct the building by the *plans already acquired.* (Act April 15th, 1886, Appendix, p. 1.)

The act of April 15th, 1886, throughout, directs that the construction of the building be begun at once, and

makes special provisions to obviate delay. Land, which necessarily had to be selected with respect to the requirements of the plans, was to be purchased within thirty days from the date of the act, or condemned at the expiration of that time. (Appendix, pp. 1, 2, 3.)

When, therefore, the defendants thus began to use the plans of the firm, they were not induced so to do by a special price to be paid for them, nor, in view of the uncertainty of the subsequent employment of the firm, can the defendants have intended or foreseen a special price when the property was taken, but under the rule (*supra*) must have acted with the intention of paying the usual price.

2. The contracts in regard to the salaries, made by the claimants, were made on behalf of the defendants by the commission created by the act of April 15th, 1886. The commission had no powers save those granted by the act. The act did not authorize them to make a contract on behalf of the defendants with the claimants, binding the defendants to pay them any specified price for their plans *already appropriated*, whether smaller or larger than the usual price. The commission had no power to procure other plans if the claimants would not sell at such price as it might think fit to offer, yet *was* under a positive command to build. The pertinent part of the act reads:

"The construction of said building, substantially according to the plan submitted * * * shall be in charge of a commission composed of the Secretary of the Interior, the architect of the capitol extension, and the Libarian of Congress, who shall be *authorized and directed to make contracts for the construction thereof after proper advertisement and the reception of bids.*" (App'x, p. 1.)

The want of power in the commission to make such contract, the acknowledgement by Congress that no such

special or express contract had been made, nor that the "acts of the parties" had fixed the price to be paid for the plans, nor that there had been "mutual acquiescence" as to a specified price, are all further shown by the act of October 2, 1888. (App'x, pp. 4, 5.)

By this act Congress abolished the commission and put the Chief of Engineers of the Army in its place; it directed that the building should not be further constructed by the claimants' plans; it made no mention of the discharge of the claimants or either of them, but did provide that their plans should be paid for, notwithstanding the fact that further benefits from them were to be discontinued. The act reads:

"And all contracts for work or materials not necessary for the execution of the work contemplated herein are hereby rescinded. And all loss or damage occasioned thereby or arising under said contracts, *together with the value* of the plan for a library building submitted to the Joint Select Committee on additional accommodations for the Library of Congress by John L. Smithmeyer in the Italian renaissance style of architecture, may be adjusted and determined by the Secretary of the Interior." (App'x, p. 5.)

The contracts rescinded were those express contracts which the commission was authorized to make for the future construction of the building, by the act of 1886. A sharp distinction is here drawn between those express contracts made by the commission and the contract with the claimants, it being spoken of as something in *addition* to them and as not of them, and an agreed upon price is not directed to be paid, but *the value* of the plans is to be *determined.*

These are "the acts of the parties," so far as the defendants are concerned, which, the court below hold, "indicate that the services should be estimated, * * * not according to the schedule of charges of the Institute of Architects." If there is any single act done

by the defendants which indicate otherwise than affirmatively that there was no intention on the part of Congress, either before or after the salaries were accepted, to pay any other price than the usual price, we have overlooked its bearing. It is true that the defendants did make a contract with each of the claimants for *future* services, but excluded from them all reference to past services or the plans. *Expressio unius exclusio alterius.*

b. OF THE CLAIMANTS.

1. The plans were the property of the firm; the services rendered in their preparation were rendered by Mr. Smithmeyer and Mr. Pelz, as a firm. Any contract in regard to the price to be paid must have been made with the firm, or with either member *acting for the firm.*

These contracts for salaries were made at different times after the plans were in use. Mr. Smithmeyer was appointed on October 1, 1886, and Mr. Pelz not till the 13th of November, 1886. Was the "*mutual* acquiescence" in the price to be paid for the plans reached when Mr. Smithmeyer accepted *his* appointment, at which time Mr. Pelz was not a factor in the situation, or did Mr. Smithmeyer bind the firm conditional on Mr. Pelz's appointment, or did he again declare himself *after* Mr. Pelz's appointment?

It is not the least odd feature of this case that the court below finds as a fact, that the acceptance of a salary by each of these gentlemen did not affect the mutual interests of the firm.

"*The claimants were not employed as a firm and neither had any interest in the employment of the other,* or in the services to be rendered by the other or in the compensation to be paid for such services." (Additional Finding I, Record, 14.)

2. The court found the following facts:

"The acceptance of the salaries by Smithmeyer and Pelz were *the only acts* as far as appears done by them or

either of them, or agreements express or implied between them and the defendants or the commissioners relative to their compensation as architects either *for preparing the plans* or superintending the work." (Additional Finding III, Record, p. 14.)

Now having found that the acceptance of the salaries were the only acts done between the claimants and defendants "relative to their compensation as architects either for *preparing the plans* or superintending the work," the court found further that "their employment" (under salaries) "*related solely* to service to be rendered by them in the *future construction* of the building *and no other*." (Additional Finding I, Record, p. 14.)

Here is an explicit declaration by the court that the acceptance of the salaries had no relation whatever to the plans, was not an express contract fixing a price for them, and that there was no other act done which did fix a price for them. If this be coupled with the finding that the usual rate is *never* deviated from *except* by express contract, the conclusion by the court that it *was* deviated from is wholly inexplicable. (See Finding IX, Record, p. 8.)

3. If the acceptance of the salaries be considered as a general admission by the claimants that their labors in the past were at no time worth more than $5,000 for Mr. Smithmeyer, and that Mr. Pelz's were not so valuable, but were only worth $3,000, this admission can not operate as an estoppel to prevent them showing the real value of their plans, since the defendants were not influenced by it, but acccepted the plans and began using them before the admission was made, and *a fortiori* it could not have been made by the claimants with the *intention* of influencing the action of the defendants.

1 Greenlf. Ev., sec. 209.

There was no Motive for a Deviation from the Schedule by Claimants, and from a Business Standpoint their Adherence to it was a Necessity.

We submit that, even though there be some other technical rule of law or equity unknown to us, which might be cited in support of the ruling of the court below, the facts are conclusive that the claimants did not have the *intention* of accepting less for their plans than the usual and real value, at any time, either while preparing the plans, at the time of their completion, delivery to, acceptance and use by the defendants, or at the subsequent periods when the claimants accepted *new* employments.

"Claimants, in the year 1874, gave up their private business as architects, and from that time on until 1886 devoted themselves almost exclusively to the preparation of the plans above described, and up to the time of the commencement of this suit they had not regained their private business.

"In 1882 one of the firm, Mr. Smithmeyer, traveled throughout this country and in Europe, visiting different library buildings in New York, Philadelphia, Boston, Baltimore, Liverpool, London, Paris, Brussels, Vienna, Berlin, Dresden, Leipsic, and Hanover, at the request of the said Joint Select Committee, for the purpose of obtaining information in respect to the architecture of the great library buildings of the world." (Finding V, Record, p. 6.)

Can it be reasonably presumed that Mr. Smithmeyer practically gave up the general practice of his profession for thirteen years, from which he might reasonably hope for an income of $5,000 a year, with the *intention* of securing by the enormous labor done during that period, if he was not beaten by a competitor, or if Congress did not fail to erect the building, *$5,000 a year for only six years*, his share of *the expenses of the thirteen years' labor to be borne out of that?*

The claimants paid from $2 to $10 a day to clerical assistants, draughtsmen, etc., during the preparation of the plans, besides paying all other office expenses. (Finding XI, Record, p. 10.)

Can it reasonably be presumed that Mr. Pelz gave up practically the general practice of his profession for thirteen years, from which he might reasonably hope for an income of $3,000 a year, with the *intention* of securing by the enormous labor done during that period, if he was not beaten by a competitor, or if Congress did not fail to erect the building, *$3,000 a year for only six years, or at a rate at which the firm was paying its principal draughtsman*, his share of *the expenses of the whole thirteen years' labor to be borne out of the amount thus received*?

A conclusive presumption arises that the *intention* was to do the enormous labor, incur the great expense, and run the enormous risks only because of the reasonably large reward which the universal usage of the profession put within their reach if they should triumph over the difficulties of the undertaking, competitors, and the uncertainties of congressional action, and succeed.

During these thirteen years the universal usage of the profession proclaimed steadily the price of the plans which they were preparing, and during that thirteen years, while from time to time the subject was before Congress, no suggestion was made that a smaller price must be taken, or that the usual price was too high.

Certainly up to the acceptance of the plans in 1886, there was no motive, no reason, for the claimants to deviate from their original intention, but every additional year of labor and expense from 1873 must have intensified the determination to secure at least the usual reward.

On April 15, 1886, Congress accepted the plans and directed immediate work on the building, and, at the time the defendants thus dealt with the claimants in their

trade or profession, the defendants did not ask the claimants to fix a price for their plans, did not question the reasonableness of the usual price, and did not ask the claimants to take a smaller price.

No motive or reason can be found *at* the time the plans were accepted, because of which the claimants can be presumed to have entertained an intention to relinquish the reward for which they had struggled, to deviate from the usual price.

After this transaction was closed so far as the claimants were concerned, and the plans were in the hands of the defendants and the benefits were being enjoyed, the claimants were asked to do other service.

They were not told that they must take a smaller price for their plans in order to secure the additional employment; they were not told that the usual price for the plans was too high; no reference whatever was made to the plans, and this second dealing between claimants and defendants referred exclusively to future work. (Additional Findings I and III, Record, p. 14.)

The narrowest scrutiny can find no reason at the time the *salaries* were accepted to cause the claimants to form the *intention* to relinquish the usual reward for the many times the usual labor which they had done.

We do not discover anywhere in this case those "exceptional circumstances" stated by the court below to be invariably present to induce architects to deviate from the usage of the profession whenever such deviation occurs. We state the proposition, however, which, we submit, can not be contradicted, that all the facts in this case in 1886 constituted such "exceptional circumstances" as to make it an absolute necessity from a business standpoint for the claimants to adhere rigidly to the usual rates of charge, and not to lower them.

The Failure to Copyright is Not Material.

In its opinion the court below makes reference to the fact that the plans, drawings, etc., were "not covered by letters patent," and that they were "not protected by copyright."

We assume that the facts are too clear that the claimants did not voluntarily donate the originals of these plans and drawings to the public, to make it a question whether or not the defendants, by simply having gotten possession of them, *after requesting their preparation*, could appropriate, without making payment, the results of the claimants' labors and expenditures.

It was certainly not necessary for the claimants to copyright their plans made by request, and, therefore, under contract when accepted and used, in order to enforce that contract.

Both Claimants did not Deviate from the General Rule of Architects when they Accepted Salaries.

The court below states as the reason in part for their refusal to allow the claimant's the usual compensation for their plans, that, in accepting the two salaries, both claimants had "departed from the general rule of architects of measuring their compensation by the customary fees of their profession." If such departure in regard to *future* employment would have had the disastrous effect upon their past services or plans given it by the court, it is not material, for both claimants did not make the departure stated. On the 1st of October, 1886, Mr. Smithmeyer was asked to take the position of "architect," by the commission authorized to construct the building according to the previously acquired plans. His duty was the superintendence of the construction. (Additional Finding I, Record, p. 14.)

On the 13th of the following November, the progress of the work requiring an expert draughtsman, Mr. Pelz was employed as "principal draughtsman." (*Ibid.*)

The distinctly specific and separate service for which Mr. Pelz was employed is not mentioned in the schedule of architects, and, therefore, in accepting the $3,000 for this service Mr. Pelz did not deviate from the schedule of architects. Nor, in measuring the compensation for the services to be rendered, did he deviate from the usage of the profession, since a "principal draughtsman" by such usage appears to receive $10 per diem. (Finding XI, Record, p. 10.)

Why Claimant Accepted Salaries for Future Services.

The schedule rates include the expenses of the architect. In this great work of construction to be done under the direction of the Government's commission and the eye of Congress, it is not strange that the Government should prefer to meet all expenses and pay fixed salaries to employés; nor is it strange that the claimants should consent to accept employment with *certain* remuneration, which, it appeared, they should retain for a number of years, all of the expenses of the service being paid, upon a lower basis of compensation than the schedule rate, if they both did deviate from it.

But there was a stronger inducement to accept for the future employment the salaries offered than the probable *length* of the employment, the *certainty* of the compensation, and, so far as Mr. Pelz was concerned, the inferior character of his employment, it being such as the firm paid subordinates to do in the preparation of the plans. This inducement was the loss of their private business, growing out of the devotion of their time to the preparation of the plans and to the great benefit of the defendants.

"Claimants, in the year 1874, gave up their private business as architects, and from that time on until 1886 de-

voted themselves almost exclusively to the preparation of the plans above described, and up to the time of the commencement of this suit they had not regained their private business." (Finding V, Record, p. 6.)

We take the liberty of suggesting that if these separate compensations for two distinct kinds of service in the future, taken as a measure of the value of the plans, had provided together a *larger* sum for them than the *usual* price, such measure of their value could hardly be enforced in *favor* of the claimants and *against* the defendants, because of the extreme difficuly the claimants would have in proving a "mutual acquiescence" in any other than the *usual* price.

There was no Duty on Claimants to Expressly Reserve their Right to the Usual Compensation for their Plans when they Accepted Salaries for Future Services.

The court below holds that because the claimants made "no express agreement or reservation as to the preceding part of their services," therefore they had lost the right to the value established by the usage of the profession, that is, the price usually asked by the seller and usually paid by the buyer.

The failure of the claimants and the failure of the defendants to fix a price is exactly the state of facts which makes the *usual price binding on both.* There was no duty on the claimants to specify that they were selling at the usual price. The usage spoke for them. If they had intended to sell at a *different* price then the duty was on them to declare it.

The duty, however, *was* on the *defendants* to declare the price they intended to pay *in order to escape paying the usual price.*

The Queen *v.* Doutre, and other cases cited *supra.*

In The United States *v.* Great Falls Mfg. Co. (*supra*), this court held that the failure of a citizen to fix the price, or demand the price of private property taken or used by the Government *before* the taking or use, in no way lessened the citizen's right to the real and full value of it.

The Cost of the Building upon which to Base the Percentage.

Mr. Justice Nott, who wrote the opinion of the court below, but who dissented from the conclusion reached by the majority of that body, held the claimants to be entitled to the compensation established by a usage so reasonable and just as never to be deviated from "except under exceptional circumstances."

The opinion holds, however, that, if the usage should govern, $5,586,200 should be taken as the cost of the building upon which to base the percentage, and not $7,000,000, on which basis the claimants would be entitled to $136,355, instead of $171,700. This conclusion was reached upon the following premises:

"In 1884, while the claimants' plans were still under consideration in Congress, the claimant, Smithmeyer, prepared a paper entitled "Description of the plans for a new building for the Congressional Library," which was "Ordered to be printed for the information of the members of the House, April 3, 1884." The plans referred to in this document were the same plans then before Congress, subsequently designated as the plan of John L. Smithmeyer in the act of 1886, after which the building is now being constructed; and it was an accurate description of the said plan as then existing. It concluded with the following paragraph:

"The approximate estimate of the cost of completing this structure made from the drawings on hand this date, *i. e.*, the plan adopted by the committee, in the Italian renaissance style of architecture, in stone and iron, will be $3,262,600, and the cost of completing such portions of the inside for occupation as will accommodate one million of books will be $2,323,600. (Finding VIII, Record, pp. 7, 8.)

The deduction in the opinion is—

"The building is not yet erected, the actual cost is not yet determined, and the claimants' case therefore comes back to the fact that the only 'proposed or estimated cost' of the building which existed when the plan was adopted and the Government's liability begun, was an estimate which they themselves had made, and upon which Congress had acted, and that this estimate names the probable cost of $5,586,200. We must therefore conclude that if the claimants are entitled to recover a commission of 2½ per cent., the computation must be restricted to this estimate or proposed cost of $5,586,200, and can not be made on the more probable but still uncertain cost of $7,000,000." (Record, p. 18.)

The doctrine of estoppel is the only rule of law which can support this reasoning.

The doctrine of equitable estoppel operates to exclude the truth by preventing the statement of a fact correctly by one who has previously incorrectly stated it; and courts have ever been loath to enforce this rule unless the circumstances of the case make it equitable and unmistakably applicable.

Is its application against the claimants equitable and unmistakably indicated? The following propositions show to the contrary:

1. The defendants were informed, in connection with the estimate of $5,586,200 by Mr. Smithmeyer, that it was not intended to convey an exact idea of the probable ultimate cost, but was intended to convey an "approximate" idea. (*Supra.*)

2. The materials had not been designated by the defendants (Finding VIII, 1st par., Record, p. 7), and the material and character of that material were roughly assumed by the claimants for the purpose of this very rough calculation.

3. The estimate was of the cost of the building only partly completed. (Finding VIII, *supra.*)

4. The estimate was not made upon the plans as they were approved and accepted by the defendants. The estimate was made in 1884, and, by direction of the defendants' agents, the claimants in 1885 or 1886, before their acceptance, made extensive changes in the plans upon which the estimate was made in 1884.

In speaking of the plans on which the estimate was made the court says (Finding IV, par. 8, Record, p. 5):

"These plans *with exterior modified as set forth in paragraph 10 below*, are the plans adopted by act of Congress of April 15th, 1886, aforesaid, and they were readopted by the act of March 2, 1889, above cited."

"The set of the Italian renaissance plans prepared in 1880 by the claimants, under instructions of the committee, as aforesaid, was *very severe and simple*, and at the request of the said committee, *in 1885 or 1886*, two new designs were prepared by the claimants in the same style of architecture and submitted to them. These exterior plans were *more ornate* than those submitted in 1880." (*Ibid.*, paragraph 10.)

5. If it be admitted that in 1886, when the plans were accepted, *after* the changes in them directed by the defendants' agents, the defendants acted on the representation as to the "approximate" cost made in 1884 *before* the changes (which is somewhat questionable), the claimants are in nowise affected thereby.

The representation, in view of the uncertainties of the situation, was remarkably *correct*, and the defendants could not have been misled by it unless by their own negligence.

The representation was, that to complete the building proposed by the plans *so far* as to accommodate *one million of books* would approximatively cost $5,586,200. (Finding VIII, *supra.*)

The estimate of $7,000,000 was made by General Casey, Chief of Army Engineers. It was made under

authority of act of Congress of October 2, 1888, two years after the acceptance of the plans, creation of the commission, and the beginning of construction.

The materials and all necessary details upon which to base an accurate estimate of cost were known to him.

The estimate was made for Congress. It was upon the plans as they were accepted after they had been changed in 1885 or 1886. Congress acted upon it in 1889. (Finding VIII, Record, p. 7.)

The completion of the building *so far* as to accommodate 1,560,000 books (Mis. Ho. Doc., No. 12, 50th Cong. 2d sess. p. 7,) was estimated by General Casey to cost $6,003,140, and the completion of the balance according to the plans as they were when accepted in 1886 and used for two years, by his estimate, would add the other million, making the whole cost $7,000,000. (Finding VIII, Record, p. 7.)

The changes in the plans, the knowledge of materials, and the *additional* construction estimated for over that estimated for by Mr. Smithmeyer, which was to accommodate only 1,000,000 books, make the elements which account for the difference between Mr. Smithmeyer's estimate and General Casey's, and they prove the former to be in no way misleading.

We fail to see where the defendants were misled by Mr. Smithmeyer's estimate, either as to the cost of the building, or as to the amount which the claimants' plans would be worth if accepted and used, even if an estimate *made under such circumstances* as surrounded Mr. Smithmeyer's were such that a reasonable man would be warranted in relying on it with certainty.

There are too many reasons to permit of statement why this representation can not operate as an estoppel.

We summarize in the language of this court (Brant *v.* Virginia Coal and Iron Co., 93 U. S., 326):

"It is difficult to see where the doctrine of equitable estoppel comes in here. For the application of that doctrine there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury."

The object to be sought here is the real cost of the building erected by the claimants' plans, as near as the circumstances of the case will permit it to be determined. The estimate by General Casey of the building erected according to the plans *as they were when accepted* and used up to October, 1888, is the only accurate and reliable one, and in fact the *only one of any kind ever made* upon the plans as they were when accepted, and the defendants have declared that they were going to get as much present benefit out of the claimants' plans as building to the extent of $6,500,000 would give them. The act of 1886 appropriated $500,000, (Appendix, p. 1,) the act of 1888, $500,000, (Appendix, p. 4,) and the act of 1889 authorized the further use of $5,500,000. (Appendix, p. 5.)

That the only reliable information as to the cost comes through the instrumentality of the defendants' agent, appears to the court below to be pregnant with some principle which bars the claimant from deriving advantage from it. The cost of the building when erected according to the plans is the material point and not the means by which that cost is made known, so long as those means make it known with reasonable certainty.

We do not follow the reasoning of the court below on this point, and do not see its pertinency, and so submit it to this court.

This actual estimate by the Chief of Army Engineers was made after the plans had been in use by the defendants as accepted for two years (act, October 2d,

1888, Appendix, pp. 4, 5). After thus using them from 1886 to 1888 as accepted and as repeatedly passed upon by the various committees and commissions, it became apparent to Congress that less book space than that provided by the plans would hold the books likely to accumulate for a reasonable number of years, and that, therefore, *present* economy would be subserved by not utilizing the part of the plans giving the greater space than that suitable for *present* needs. General Casey estimated that certain storage magazines, located in the courts formed by the four facades, might remain unbuilt and a present saving be effected of $1,000,000, and that the remaining portion of the building necessary to be erected at the present time, and to hold 1,560,000 books, would cost $6,003,140 (Findings, VII, VIII, Record, pp. 6, 7; Ho. Doc., *supra*.) These storage magazines can be built in the courts at such time as the continuing accumulation of books shall make more storage room necessary, and thus all of the benefits of the claimants' plans be fully enjoyed by the defendants whenever convenient to them.

We submit that when the defendants accepted the claimants' plans in their entirety, after requesting through their agents their preparation, and after having aided from time to time in indicating through those agents the requirements of the building, and after using them as accepted for two years, the defendants had fixed their liability which they could not vary by any subsequent *ex parte* action. We submit that the change of mind of the defendants after using the plans, and their determination not to erect all of the building proposed in them, whether from motives of *present* economy or *actual* economy, or any other motive, can have no bearing on the rights of the claimants fixed in 1886.

Those rights entitled them to a percentage of 2½ per cent. on $7,000,000, the actual estimated cost of the

building according to the plans accepted and used by the defendants.

The defendants themselves acquiesced in this view. In 1888 they determined to utilize no more of the benefits of the claimants' plans than they had already done up to that time, yet declared by the act of October 2d, 1888, after expressing this determination, that the claimants were entitled to receive, not compensation for only *that part of the plans used,* but the *value* of the plans. (App'x, p. 5.)

There is an equality of benefits flowing to both parties from a reliance upon the defendants' own estimate of cost, and the only one in existence.

It is fully established that buildings when erected generally cost more than the estimated cost. This is particularly notorious in regard to public buildings.

Thus if the claimants can not rely on this actual estimate from plans, materials, labor, quantities, etc., butmust wait until the actual cost of the building is determined, after its completion, the defendants will probably have to pay more than if payment is made upon the estimate we now have.

If, on the other hand, this delay is forced upon the claimants and they must wait until this public building of a monumental character is completed before receiving their compensation, the history of public building gives them no hope of enjoying it for years. And if the work be stopped for any reason, as has already happened in this case for a short time, and as happened in the erection of the Washington Monument for years, the fruits of their best labors may be enjoyed by their descendants, but not probably by themselves.

By the usage of the profession, if plans are ordered to be prepared, or other partial architectural service done, and contracted to be paid for at the usual rates, and after preparation and acceptance the buyer concludes not to

build, the "proposed cost" of the building must furnish the measure of compensation. (Findings IX, X, Record, pp. 8, 9.)

In the case at bar we have an *actual* estimate of cost based on known materials, and amounts, labor, etc., shown to be required by the plans, and we submit that the propriety of using the cost thus shown can not be questioned.

The Claimants are Entitled to Double the Amount of the Judgment Below, even on the Basis on which that Judgment Rests.

Should, however, the method of computing the damages adopted below be affirmed and it be held that the claimants did deviate from the usage of the profession as to their plans, then we submit that they have not been given the benefit of that value of their services in which there was "mutual acquiescence."

"In fixing $48,000 as the fair and reasonable value of claimants' services in preparing said plans, accepted and adopted by the defendant, no allowance has been made for the expenses of the architects' office." (Additional Finding V, Record, p. 15.)

When they were preparing the plans for defendants the claimants paid all the expenses incidental to an architect's office. These expenses are usually 50 per cent. of an architect's gross receipts. (Finding XI, Record, p. 10.)

The exact amount of money spent by the claimants does not appear; but it is not necessary that it should appear, the testimony of experts competently fixing the usual percentage.

Harvey *v.* The United States, 113 U. S., 243.

When the claimants were employed *after* the acceptance of the plans, the defendants agreed to pay all of

expenses, which claimants would have had to meet under their ordinary employment. (Additional Finding II, Record, p. 14.)

The expenses of the architect's office, thus paid by the defendants, amounted to $16,901.64 per year. (*Ib.*) They were, therefore, paid salary and expenses.

They received together $8,000 a year net. The expenses incidential to the practice of their profession, being half of the gross income, just equalled the net income, namely, $8,000 a year. This is shown to be a very reasonable estimate, since the expenses of running the architect's office in the construction of this building cost the defendants *double* this each year (*supra*).

The value of their services, therefore, in which there was " mutual acquiescence," if they deviated from the schedule, was $16,000 a year under such deviation from the usage of the profession. By the usage the *architect* bears the expenses.

If they are only to be paid for six years service therefore, they are entitled to $96,000.

We further call attention to the fact that they did service upon these plans which was not included in the six years, and that no compensation was allowed for this additional service. (Additional Finding IV, Record, p. 15.)

The Jurisdiction of the Courts.

It was urged on behalf of defendants below that the act of October 2, 1888, authorizing the Secretary of the Interior to adjust, determine, the value of the claimant's plans, vested in him *exclusive* jurisdiction to pass upon the claimant's rights.

Their right of action accrued in 1886, from which time the Court of Claims, under its general jurisdiction, had full jurisdiction over it.

To give the Secretary exclusive power over the claimants' right, the act of October 2, 1888, must have repealed

the jurisdictional act of the Court of Claims to the extent of this case, *and that too by implication.*

The reason for the direction to the Secretary to pay was clearly because never before had there been any agent of the defendants' authorized to receive the claimants' demand, and their only remedy was in the courts.

Congress provided a way by which they *might* reach a satisfactory settlement with the defendants without the burdens of litigation. It was but ordinary fairness on the part of the debtor, and was intended for the claimant's benefit. To this extent the act was remedial, and must be liberally construed, and as intended to give a benefit, and as not intended to take away a broader and fuller remedy, a greater benefit already had by the claimants.

Bechtel *v.* U. S., 101 U. S., 597.

The claimants waived the benefit of the law.

Shutte *v.* Thompson, 15 Wall., 151.

There is no reason in law, ordinary fairness, or common sense, it is submitted, why the defendants should have acknowledged the debt and at the same time have *intended* to take from the claimants a remedy already possessed by them in common with all other citizens; and, in the event that they and the Secretary should not agree, to leave them remedyless.

Repeal by implication is not favored. The courts hold it to have occurred only when the two acts are repugnant in their provisions and can not stand together, and particularly is this so where a right already vested would be taken away by such repeal.

Chew Heong *v.* United States, 112 U. S., 536;

United States *v.* Henderson's Tobacco, 11 Wall., 652.

There is no repugnancy between the act giving jurisdiction to the Court of Claims and the act of October 2, 1888; they stand together without the slightest conflict. The latter is an offer by the defendants to pay and a direction to their agent to make payment if he and the creditors can agree; the former preserves to them the ordinary judicial remedy.

In the case of Gordon *v.* The United States (7 Wall., 188) this court held that various acts of Congress, similar to that now considered, authorizing the Secretary of War and other officers to adjust and pay certain claims, were mere directions by Congress to such officers to take *ministerial* action, and that their determination of the amount due was not *judicial*, and did not even have the dignity of an arbitrement, and was not binding on any one.

The granting of such *ministerial* authority to an *executive* officer can not by implication take away from the court the power there vested to dispose of the claimants' right *judicially*.

See also Degroot *v.* U. S., 5 Wall., 432.

But we submit, whatever question there may be is set at rest by this court in the case of Campbell *v.* The United States (107 U. S., 407). Congress declared that certain duties should be refunded to certain importers, the amount to be determined by the Secretary of the Treasury. The Court of Claims held it had no jurisdiction of a suit for such duties.

This court, reversing the court below, said:

"It is an error to suppose that the officers of customs, including the Secretary, are in regard to this law *created a special tribunal* to ascertain and decide conclusively upon the right to drawback. Their function is entirely *ministerial*. They are authorized to pass upon no question essential to the claimant's right so as to conclude him in a court of competent jurisdiction. * * * He

exercises no judicial or *quasi* judicial function. He concludes nobody's rights, and has no power to do so."

It further held that the Court of Claims had jurisdiction of the subject-matter, and that the act directing the Secretary to ascertain the amount and pay it did not in any way take from that court such jurisdiction when the right of action had accrued, as it had in the case at bar before the act of October 2, 1888.

The claimants were not under any duty to make an effort to have the amount due them determined before bringing their suit.

United States *v.* Great Falls Mfg. Co. (*Supra.*)

Respectfully submitted,

JOHN PAUL JONES,
REESE H. VOORHEES,
For Appellants.

APPENDIX.

An act authorizing the construction of a building for the accommodation of the Congressional Library.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a fire-proof building, for the accommodation of the Library of Congress, shall be erected east of the Capitol, and either between B street north and East Capitol street and First street east and Second street east, or between B street south and East Capitol street and First street east and Second street east, and as the commission hereinafter provided shall determine; and the construction of said building, substantially according to the plan submitted to the Joint Select Committee on Additional Accommodations for the Library of Congress, by John L. Smithmeyer, in the Italian renaissance style of architecture, with such modifications as may be found necessary or advantageous, without materially increasing the cost of the building, shall be in charge of a commission composed of the Secretary of the Interior, the Architect of the Capitol Extension and the Librarian of Congress, who shall be authorized and directed to make contracts for the construction thereof, after proper advertisements and the reception of bids; and the sum of five hundred thousand dollars is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to commence the construction of said building; and the moneys appropriated for said building shall be disbursed by the Secretary of the Interior.

Sec. 2. That in order to procure a suitable site for a building for the Library of Congress so much of the land situated east of the Capitol grounds above described shall be purchased by said commission, or taken for public use as hereinafter provided, and not less than the whole of that portion bounded on the north by B street north, on the east by Second street east, on the south by East Capitol street, and on the west by First street east; or if that portion should not be so purchased or taken for public use, then the whole of that portion bounded on the north by East Capitol street, on the east by Second

street east, on the south by B street south, and on the west by First street east; and a sum of money sufficient to pay for said land, in the mode hereinafter provided, is hereby appropriated therefor out of any moneys in the Treasury not otherwise appropriated.

Sec. 3. That said commission shall be authorized to purchase said land, or any part thereof, as soon as practicable, at such prices as may be fixed by agreement between said commission and the respective owners: *Provided, however,* That said commission shall not pay in the aggregate for the site aforesaid, including the whole of said land as described lying north of East Capitol street, or the whole as described lying south of East Capitol street, more than five hundred and fifty thousand dollars; and if they are not able to purchase the whole of either portion of said land, they may purchase any parcels thereof, for sums not exceeding, in their best judgment, that proportion of five hundred and fifty thousand dollars which the value of the parcel or parcels purchased bears to the value of the whole land; and the payment therefor shall be made to the respective owners, on the requisitions of the Secretary of the Interior, upon the release and conveyance of said land to the United States by good and sufficient deeds executed in due form of law: *And provided further,* That no money hereby appropriated shall be expended for the purchase of said land, or any part thereof, or for the erection thereon of said library building, until the written opinion of the Atttorney-General shall be had in favor of the validity of the title to said land.

Sec. 4. That if said commission shall be unable to purchase the whole of said land lying north of East Capitol street, or the whole of said land lying south of East Capitol street, by agreement with the respective owners, within thirty days after the passage of this act, within the limitations prescribed by this act, they shall, at the expiration of such period of thirty days, make application to the Supreme Court of the District of Columbia, at a general or special term, by petition containing a particular description of the property required, with the name of the owner or owners thereof, and his, her, or their residence, as far as the same can be ascertained, which court is hereby authorized and required,

upon such application, without delay, to ascertain and assess the damages occasioned by the taking of said land to each owner thereof, or to any person having a legal claim to said damages, in the manner provided with reference to the taking of land for highways in the District of Columbia.

Sec. 5. That the fee simple of all premises so appropriated for public use of which an appraisement shall have been made under the order and direction of said court shall, upon payment to the owner or owners, respectively, or to such person as shall be authorized to receive the same for any such owners, of the appraised value, or in case the said owner or owners refuse or neglect for fifteen days after the appraisement of the cash value of said lands and improvements by said court to demand the same from the Secretary of the Interior, upon depositing the said appraised value in said court to the credit of such owner or owners, respectively, be vested in the United States; and said commission is hereby authorized and required to pay to the several owner or owners, respectively, or to such persons authorized as aforesaid, the appraised value of the several premises as specified in the appraisement of said court, or pay into court, by deposit, as hereinbefore provided, the said appraised values.

Sec. 6. That said court may direct the time and manner in which possession of the property condemned shall be taken or delivered, and may, if necessary, enforce any order or issue any process for giving possession. The cost occasioned by the inquiry and assessment shall be paid by the United States; and as to other costs which may arise they shall be charged or taxed as the court may direct.

Sec. 7. That no delay in making an assessment of compensation, or in taking possession, shall be occasioned by any doubt which may arise as to the ownership of the property, or any part thereof, or as to the interests of the respective owners. In such cases the court shall require a deposit of the money allowed as compensation for the whole property or the part in dispute. In all cases as soon as the United States shall have paid the compensation assessed, or secured its payment by a deposit of money under the order of the court, possession of the property may be taken.

Sec. 8. That the Secretary of the Interior shall annually report to Congress at the commencement of each session, a detailed statement of all the proceedings under the provisions of this act.

Approved, April 15, 1886.

An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-nine, and for other purposes.

* * * * * * *

BUILDING FOR THE LIBRARY OF CONGRESS.

For the building for the Library of Congress, as herein provided for, and for each and every purpose connected therewith, including the cost of all profession and other personal services that the Chief of Engineers of the Army may deem necessary for the work and shall specially order, five hundred thousand dollars.

This appropriation and all appropriations hereafter made, and all sums available from appropriations heretofore made for this purpose shall be expended under the direction and supervision of the Chief of Engineers of the Army, who shall have the control and management of all of said work, and the employment of all persons connected therewith. And all contracts for the construction of said building, or any part thereof, shall be made by the Chief of Engineers of the Army, and so much of the act entitled "An act authorizing the construction of a building for the accommodation of the Congressional Library," approved April fifteenth, eighteen hundred and eighty-six, as requires the construction of said building substantially according to the plan submitted to the Joint Select Committee on Additional Accommodations for the Library of Congress, by John L. Smithmeyer, and so much of the first section as provides for a commission, together with the eighth section of said act, be and the same are hereby repealed, and the duties of said commission under said act are hereby devolved upon the Chief of Engineers of the Army, who shall annually report to Congress at the commencement of each session a detailed statement of all the proceedings under the provisions of this act, and hereafter, until otherwise ordered by Congress, no work shall be done in the construction of said

library except such as is herein provided for, and all contracts for work or materials not necessary for the execution of the work contemplated herein are hereby rescinded. And all loss or damage occasioned thereby or arising under said contracts, together with the value of the plan for a library building submitted to the Joint Select Committee on Additional Accommodations for the Library of Congress by John L. Smithmeyer, in the Italian renaissance style of architecture, may be adjusted and determined by the Secretary of the Interior, to be paid out of the sums heretofore or hereby appropriated: *Provided*, That before any further contracts are let for the construction of said building general plans for the entire construction thereof shall be prepared by or under the direction of the Chief of Engineers of the Army, which plans shall be subject to the inspection and approval of the Secretary of War and the Secretary of the Interior: *And provided further*, That the total cost of said building shall not exceed four million dollars, exclusive of appropriations heretofore made.

* * * * * * *

Approved October 2, 1888.
(25 U. S. Stats., 523, 524.)

An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety, and for other purposes.

* * * * * * *

BUILDING FOR THE LIBRARY OF CONGRESS.

For the building for the Library of Congress, as authorized by the sundry civil appropriation act approved October second, eighteen hundred and eighty-eight, except as herein modified, and for each and every purpose connected therewith, five hundred thousand dollars. And said building shall be constructed in accordance with the plans marked "D," submitted by the Chief of Engineers with his annual report to Congress, being Miscellaneous Document number twelve, Fiftieth Congress, second session, and at a total cost therefor not exceeding five million five hundred thousand dollars exclusive of appropriations heretofore made, and no changes or modifi-

cations shall be made that will increase the cost above the limitation herein prescribed: *Provided*, That contracts may be entered into for all the stone required for the exterior walls of said building, to be paid for as appropriations may from time to time be made by law.

* * * * * * *

Approved March 2, 1889.

(25 U. S. Stats., 966.)

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

JOHN L. SMITHMEYER and PAUL J. PELZ, Appellants,

vs.

THE UNITED STATES.

Appeal from the Court of Claims.

BRIEF FOR APPELLANTS.

By J. COLEMAN,
Attorney for Appellants.

Press of McGILL & WALLACE, Washington, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1892. TERM NO. 645.

JOHN L. SMITHMEYER AND PAUL J. PELZ, Appellants,

vs.

THE UNITED STATES.

BRIEF FOR APPELLANTS,

BY J. COLEMAN.

This brief is written to show that the appellants prepared the plans for the library building now being constructed for the Library of Congress; that said plans are now being used by the United States in the construction of that building; that the United States have not paid for them; and that the appellants are entitled to recover the value of their plans, to be determined according to the rates and rules established by the custom and usage of the profession of architects, to which they belong.

STATEMENT OF THE CASE.

The petition in this case was filed in the Court of Claims in January, 1889, and the case comes here on appeal from the judgment of that court.

The petition alleged that the claimants were architects doing business in the city of Washington; that as such

they made or prepared the plans and drawings for the Congressional Library building now in process of construction in the District of Columbia.

That they were engaged in preparing the plans for said building, at the request of the defendants, from 1873 to 1886—a period of thirteen years; that the plans prepared by them were accepted and adopted by the defendants, and are being used by them in the construction of said building.

That the cost of the building being constructed according to said plans was the sum of seven million dollars ($7,000,000).

That there is due to the petitioners for said service three per cent. upon the cost of said building, the sum of two hundred and ten thousand dollars ($210,000).

That no part of it has been paid.

The defendants denied the allegations contained in the petition. (R., pp. 1, 2.)

The court below found judgment in favor of the claimants for $48,000.

They found that the claimants were "at the times hereinafter mentioned co-partners doing business as architects in the city of Washington." (Finding I, R., p. 3.)

That from 1873 to 1886, a period of thirteen years, the claimants devoted their time as architects in making plans and drawings for a building for the Library of Congress. In doing this they acted under the direction and at the request of commissioners and committees appointed by the acts of Congress appearing in the appendix hereto annexed. (See Appendix.) Finding 2 & 4

The commission, appointed under the act of Congress of March 3, 1873, published an invitation "to architects," that is, to the profession at large, to submit plans for a library building in competition for three prizes to be

awarded for superior excellence of design, namely: $1,500 for the first prize, $1,000 for the second prize, and $500 for the third prize. There were twenty-eight competitors, including the claimants, who were awarded and paid the first prize, and the second and third prizes were awarded to the designers of plans of less merit than those of the claimants.

The prospectus issued by the commission is as follows:

WASHINGTON, *August, 1873.*

To Architects:

In accordance with the provisions of an act of Congress approved March 3, 1873, the undersigned hereby invite architectural plans or sketches (not including details or working plans) for a new building for a Library of Congress, to be drawn in accordance with limits and conditions which will be furnished to applicants. The sum of fifteen hundred dollars will be paid for such design as may be adjudged the best by the commission, one thousand dollars for the second best, and five hundred to the third best, to be paid on the 31st of December, 1873.

The plans must be submitted on or before the 1st day of November next, and addressed, prepaid, to the Librarian of Congress, Washington, D. C.

Finding III and par. 1 Finding IV, R., pp. 3, 4.

None of these plans upon which prizes were awarded were purchased or used by the defendants.

As has been said, for thirteen years following the passage of the act of March 3, 1873, the claimants devoted themselves almost exclusively to the preparation of plans for this building.

The findings of fact show that the claimants gave plans for twelve different designs for a library building, upwards of one hundred drawings, each in such a state of perfection that any competent architect could from them have constructed the building. (Finding X, p. 9.)

One of the claimants traveled throughout this country and in Europe studying the different library buildings for the purpose of acquiring information from which to enable them to meet the suggestions of the committees and Congress, and to submit plans such as the necessity of the case required. The plans submitted were not copied from the work of others, nor were they taken from any other building. The plans are, from foundation to turret, including all the details of interior and exterior design and construction, the invention of the claimants. The whole work as presented and shown by the drawings and designs in evidence is the result of their skill and genius. There was nothing from which they could obtain information to guide them in their studies; no material for them to rely on; but they had to create an entirely new structure, "*sui generis*," heretofore never attempted and only to be attempted by library experts.

It is true that they traveled in Europe and observed many of the large library buildings in the old country, but they were all small in magnitude and extent compared with the one they were called upon to construct. They were mostly smaller buildings, were deficient in many of the more modern and advanced requisites and essentials of a library building, so that the examples they found to study from were of little use, and they had to turn inventors, to study what they had found in this country and abroad, analyze it carefully as to inherent principles, and then to apply their inventive genius and mold and shape the creation of their minds into an appropriate structure.

As we have said, the subject was a new one and the task of furnishing the multifarious requirements of such a building a difficult one.

The plans provide for the accommodation in the building of not only books, pamphlets, newspapers, periodi-

cals, miscellaneous leaflets, etc., but also lithographs, photographs, photo-lithographs, steel engravings, woodcuts, etchings, color prints, specimens of rare manuscripts, and typography, maps, charts, etc., and an unlimited variety of the graphic arts in the copyright department (established by law in 1870).

The plan provides for the necessary accommodations of the librarian and his assistants. Sight-seers, students, and readers are provided with accommodations. A suitable bindery is provided for books, maps, and newspapers; also rooms for the distribution, collating bibliographing, cataloguing, and packing of books. Other rooms, besides the large reading-room, are provided for the President, Judges of the Supreme Court, members of Congress, and others.

The subject of lighting, heating, and ventilating is provided for.

It is easy to perceive the magnitude of difficulties involved in the heating and lighting and ventilating so vast a structure. It involved a study of the modern methods of using iron and other non-combustible and fire-proof materials for fire-proof construction and equipments; the modern method of heating and ventilating large structures; the processes of lighting them (by day and night); the methods of protection against the ravages of fire and dampness, and of shielding the contents against destruction by heat and dust.

The use of a pneumatic tube for the transportation of parcels, books, etc., between the Library and the Capitol; the introduction of the telegraph, the telephone, electricity in its various ways as an illuminator and as a motor, etc., required the study of the architects. In short, as was said by this Court in Chicago *v.* Tilley (103 U. S., 146), they were required to prepare plans for excavations for the foundations, and for the foundations themselves, and for the sub-basement; to prepare plans and specifi-

cations for the interior of the building; to divide it into the apartments necessary to accommodate the wants of the public; to lay off the corridors, halls, and staircases; to devise all the interior conveniences and decorations of a large and costly building; to select and specify the materials of description that were to be used; to decide upon and make drawings for the structure of the inside walls, the floor, the roof; to make designs for the woodwork; to provide for the plastering, plumbing, and painting.

We can not state more clearly the facts showing the extent and magnitude of the work done by the claimants than by quoting from the opinion of Nott, Justice, in the opinion in the court below (R., p. 15):

"For the next thirteen years they spent nearly their entire time in preparing other and additional plans for the new National Library. The work was done at the request of, and in close consultation with, the committees and commissions of Congress. It seems to have been mutually understood that these committees and commissions, with one exception, had no authority to contract with the claimants or incur an obligation on the part of the Government, and the subject of compensation seems never to have been under consideration. Yet the work done by the claimants was immense, and the plans in response to repeated requests well nigh endless. There were designs for Italian renaissance; for Gothic; for improved Gothic; for French renaissance; for German renaissance; for Romanesque, and for revised Italian renaissance. There were designs for new interiors, and for changed dimensions, and for different materials. More than one hundred finished plans were elaborated and delivered to the committees. The claimants also traveled through Europe and examined the great libraries of the old world and brought back new ideas which were incorporated in new plans. Finally, on the part of the claimants, the most desirable elements of all the designs were incorporated into one, and on the part of the defendants, the general plans to carry it into effect were reported by the joint select committee in 1881, and adopted by Congress in 1886."

On the 15th day of April, 1886, Congress finally adopted the plans prepared by the claimants for a library building in the Italian renaissance style of architecture.

By the same act they took the control of the construction of the building out of the hands of the architects who had prepared the plans and placed it in charge of a commission to be composed of the Secretary of the Interior, the Architect of the Capitol Extension, and the Librarian of Congress; and appropriated five hundred thousand dollars *with which to commence the construction of the building;* and thereafter under the direction of the commission work was begun on the library under the direction of the commission. (Finding VI, R., p. 6, Appendix.)

In 1888 Congress determined to reduce the size and cost of the building then being constructed under the direction of the commission, and to place the charge of its construction under the supervision of General Casey, Chief of Engineers of the U. S. Army. This act of Congress is in the *sundry civil act of October 23, 1888* (*25 Stat. L., 505, 523*), Appendix.

It will be seen that the act of 1888 repealed the act of 1886 directing the building to be constructed according to the plans of the claimants, and limited the cost of the building to $4,000,000 and placed the superintendency of it in the charge of General Casey.

General Casey then entered upon his duty as superintendent and proceeded to reduce the cost of the building to $4,000,000 to meet the requirements of the act of 1888. He " cut out the curtains connecting the wings with the central pavilion, and the abutting wings immediately therefrom, thus eliminating the courts formed by said curtains and the storage magazines contained therein, in this way decreasing the size of the proposed building and the amount of material required in its construction."

The plans of this building are the identical plans prepared by the claimants and submitted under the act of 1888 with certain parts omitted. (Finding VII, R., pp. 4, 5.)

Congress was not satisfied with the design of the building proposed by General Casey, and submitted by him under the act of 1888, and in the *sundry civil act* of March 2, 1889, 25 Stat. at L., 939, 966, they enacted that the building should be constructed according to plan D (See Appendix.)

Plans D referred to in this act "are the identical plans which Congress had formerly adopted by the above-mentioned act of April, 1886, *with certain interior parts of the building for book magazines omitted.*" (Par. 2, Finding VII, R., p. 5.)

The parts omitted are shown by the plans submitted by General Casey in his report to Congress (see Appendix).

Plan E shows the plan of the building adopted by act of Congress approved April 15, 1886. The cost of the building under these plans was estimated to be $7,003,140. Plan D, submitted in the same report, shows the extent of the modification.

It (D) shows the portion of the interior omitted, and, as was found by the court, the omitting of this portion, while it did not change the plan of the building, diminished the cost of it $1,000,000, making the cost of the building, according to plan D, $6,003,140, upon which the building is now being constructed. To this add the cost of the part of the plan omitted, viz., $1,000,000, and it shows that the cost of the building which was to be constructed according to the plans submitted and accepted and adopted under the act of 1886 would have been $7,003,140.

The building had been in process of construction from April, 1886, under plan E, to the passage of the act of 1888, and, as we have said, would have cost, as appears by the findings, $7,003,140. (Findings VI, VII, R., pp. 6, 7.)

Since the passage of the act of 1886, directing that the building should be constructed according to the plans submitted by John L. Smithmeyer, it has been and still is in process of construction according to the plan designated by that act as modified, as heretofore stated. (Finding IV, R., p. 13.)

The act of April 15, 1886, provided that the construction of the building should be in charge of a commission composed of the Secretary of the Interior, the Architect of the Capitol Extension, and Librarian of Congress.

In the absence of special contracts he receives 2½ per cent. for preparing the plans and 2½ per cent. for superintending the construction, making 5 per cent. on the cost of the building for his work. In this instance after the plans of the claimants had been submitted and accepted, the superintendency of the construction of the building was taken from them and placed in the hands of a commission created by the act of April, 1886; they entered upon the discharge of their duties and on the 1st of October appointed John L. Smithmeyer, one of the claimants, architect of the building. They agreed to pay him a salary of $5,000 per annum. Mr. Smithmeyer accepted this position and entered on the discharge of his duties. Subsequently, and on the 13th day of November in the same year, the commission appointed Paul J. Pelz, the other of the claimants, principal draughtsman, and agreed to pay him $3,000 per year. Mr. Pelz accepted the position and entered upon the discharge of his duties.

The act of October 2, 1888, repealed that part of the act of 1886 appointing the commission to superintend

the work, and placed the construction of the work in charge of the Chief Engineer of the Army.

On the 3d of October, 1888, Mr. Smithmeyer was removed from the position he had held under the commission by General Casey, and has since had no connection with the building.

Mr. Pelz held his position at the time of the trial of the case in the court below. (Finding XI, R., p. 9.)

After the discharge of the claimant, Mr. Smithmeyer, in October, 1888, and in January following, the claimants filed their petition in the court below, claiming to recover the value of the plans and designs furnished by them for the construction of the building at the price usually and customarily charged by architects for such work, being 2½ per cent. for the cost of the building for which the plans were prepared and accepted, which has been shown to be $7,000,000. Attached to said petition was a schedule showing the design of the building being constructed upon the plans of the claimants, which by inadvertence having been omitted from the Record is printed in the Appendix hereto annexed and heretofore referred to. (See Appendix.)

No contract was entered into between the defendants and the claimants. (Finding XI, R., p. 12.)

No payment has been made to them for their services in preparing the plans.

The payment of $1,500 was the prize awarded them in accordance with the prospectus of August, 1873, for plans which were not adopted or used.

The additional payments mentioned in Finding XII were for the individual services of Mr. Smithmeyer under the act of 1880. (Finding XII, R., p. 12.)

The payment, to Mr. Smithmeyer of $5,000 per annum after October, 1886, and to Mr. Pelz after November, 1886, was for payment to them for services rendered under agreement with the commission after the plans had

been submitted and accepted and adopted, and after the appointment of the commission, and after the superintendence of the construction of the building had been taken out of their hands.

The court below found that the usual and customary charge for preparing the plans and drawings as prepared by the claimants was the sum of 2½ per cent. on the cost of the building; and that this was the rate established by the American Institute of Architects and the Western Association of Architects, and was the rule established by universal custom and usage among architects in this country.

The claimants paid during the time they were employed in preparing the plans, from 1873 to 1886, for the services of draughtsmen, computors, modelers, and experts of every kind, and also all expense for stationery, instruments, clerk hire, office rent, fuel, gas, and all other necessary expense which might be connected with an architect's office. This expense amounts to 50 per cent. of the gross receipts of an architect's office. (Finding XI, R., p. 10.)

For the work and service performed by the claimants for a period of 13 years, and the expense incurred by them in preparing the plans in question for a building to cost $7,000,000, which plans the government of the United States are now using in the construction of a building to be the largest and finest in the world, the court below allowed the claimants $48,000. (Finding XVI, R., p. 13.)

ASSIGNMENT OF ERRORS.

(1) The court below erred in not finding the measure of damages upon which the claimants were entitled to recover to be such sum as they were entitled to receive according to the usual and customary schedule adopted for like service by the American Institute of Architects,

the Western Association of Architects, and other architectural societies in this country, including those in the District of Columbia.

(2) The court below erred in not finding that the measure of damage upon which the claimants were entitled to recover was to be based upon the rates and rules established for like service by the general usage and custom of the architectural profession in this country, including the District of Columbia.

(3) The court below erred in finding that the claimants were only entitled to recover upon the *quantum meruit* for the plans furnished by them, and accepted and adopted by the defendants, the sum of $48,000.

(4) The court below erred in finding that the claimants should recover the value of their services upon the *quantum meruit*.

(5) If this court should hold the proper measure of the value of the claimants' plans to be other than that established by the usage of the profession, and that they should recover upon *quantum meruit*, the Court of Claims erred in holding that the claimants are entitled to only $48,000 upon the *quantum meruit*, the claimants should have recovered office expenses and the value of their service for thirteen years, making $144,000.

(6) The Court of Claims erred in holding that the claimants are entitled to $48,000 as the value of their plans or the services entering into their preparation instead of $171,000.

POINTS.

I.

The preparation of the plans and drawings by the claimants under the direction of the defendants, and the acceptance and use of them by the defendants created

an implied contract which bound the defendants to pay for them.

Blackstone's Com., vol. II, p. 443;
United States *v.* Russell, 13 Wall., 630;
Solomon *v.* The United States, 19 Wall., 17;
United States *v.* Gill, 20 Wall., 517;
United States *v.* Great Falls Mfg. Co., 112 U. S., 645;
Hollister *v.* Benedict Co., 113 U. S., 67;
Ogden *v.* Saunders, 12 Wheat., 132, 204.

II.

The United States is liable in damages for a breach of its contract on the same principles and to the same extent as a private party.

Gilbert *v.* Secor, 8 Wall., 358;
Mfg. Co. *v.* United States, 17 Wall., 592;
Smoot's case, 15 Wall., 36;
Chicago & Northwestern R. R. Co., 104 U. S., 680.

III.

The measure of damages in this case is the value of the plans to be determined by the general usage applicable to the profession of architects in this country and in the District of Columbia.

Parties who contract on a subject-matter concerning which known usage prevails by implication, incorporate them into their agreements, if nothing is said to the contrary.

Bouvier's Law Dic., Title, Usage;
United States *v.* Arredondo and others, 6 Pet., 691, 714—citing 8 Wheat., 591; 9 Wheat., 584;
Slidel *v.* Grandpian, 111 U. S., 412, 421;
Adams *v.* Norris, 23 How., 352;

Robinson *v.* The United States, 13 Wall., 363, 366;
Blevin *v.* New Eng. Screw Co., 23 How., 420;
Sewell *v.* Corp., 1 Car. and P., 292;
Gwin *v.* Charron, 15 Md., 502, 508;
Lyon & Scott *v.* George, 44 Md., 295;
Walls *v.* Bailey, 49 N. Y., 464;
Booman *v.* Johnson, 12 How., 573;
Lowe *v.* Liberman, 15 Ohio State, 179;
Ford *v.* Terrell, 9 Gray, 401;
Carter *v.* Phil. Coal Co., 77 Pa. State, 286;
Mayor, Alderman, etc. *v.* Thomas, 1 Pa. State, 342;
Fay *v.* Shaw, 32 Ill., 295;
Codman *v.* Armstrong, 28 Me., 91;
Vilas *v.* Downs, 21 Vt., 419;
District of Columbia *v.* Cluss, 103 U. S., 705;
Tilley *v.* The City of Chicago, 103 U. S., 155.

IV.

If the court should be of the opinion that the measure of damage is to be based upon the *quantum meruit*, then there should be added to the amount found by the court below the office expenses of the claimants, which the court found to be 50 per cent. of the gross receipts of their services.

V.

The act of Congress, October, 1888, contained these words:

"The value of the plans for a Library building submitted to the Joint Select Committee on Additional Accommodations for the Library of Congress by John L. Smithmeyer in the Italian renaissance style of architecture, may be adjusted and determined by the Secretary of the Interior to be paid out of the sums heretofore or hereby appropriated."

This act did not take away the jurisdiction of the Court of Claims or deprive the claimants of their right of action against the defendants in that court.

The plans had been furnished to the defendants, had been accepted and used by them—the claim of the claimants was perfect, and the liability of the defendants had become fixed. The right of the claimants to compensation, and their right of action to enforce payment, was a vested right which the statute of 1888 did not take away.

Dartmouth College *v.* Woodward, 4 Wharton, 561;
Hawthorne *v.* Caleff, 2 Wall., 10;
Steamship Co. *v.* Joliffe, 2d Wall., 450, 457;
Van Hoffman *v.* City of Quincy, 4 Wall., 535;
Chicago, &c., R. R. Co. *v.* U. S., 104 U. S., 680, 684, 685;
Edwards *v.* Keargy, 96 U. S., 595;
Bronsen *v* Kinge, 1 How., 317;
McCracken *v.* Hayward, 2 How., 608;
Howard *v.* Bugbee, 24 How., 461.

ARGUMENT.

First. The act of Congress of April 13th, 1886, directed that the Library building should be constructed according to the plan submitted by John L. Smithmeyer to the Joint Select Committee on Additional Accommodations to the Library of Congress, etc.

These plans, although submitted by John L. Smithmeyer, were prepared by the firm and were the property of the firm. (Finding 13.)

These plans were accepted by the United States in April, 1886, and since that time the building has been and is still being constructed according to those plans. (Finding 15.)

The plans having been accepted and used by the defendants, an implied obligation exists upon the part of the Government to pay for them. The defendants are erecting a large and costly building upon plans which they have not paid for. The principles of law as well as

the dictates of natural justice and equity raise an implied contract on the part of the defendants to compensate the claimants for their plans.

"Implied contracts," says Blackstone (vol. II, p. 443), "are such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to perform."

Second. The United States is liable in damages for a breach of its contract on the same principles and to the same extent as a private party.

In Smoot's case, 15 Wall., 36, where a contract had been entered into between the United States and Smoot, which had been subsequently changed by an order of the War Department, the court says Congress

"*Has limited the jurisdiction of the Court of Claims to cases arising out of contracts express or implied—contracts to which the United States is a party in the same sense in which an individual might be, and to which the ordinary principles of contracts must and should apply.*"

And in the case of The Chicago and Northwestern Railway Co. *v.* The United States (104 U. S., 680), where the railroad company had contracted to carry the mail in conformity to the statute of 1875 then in force, and the United States reduced the rate of compensation under the acts of 1876 and 1878, the court held that the contract could not be changed except by the mutual assent of the parties, and said:

"The United States would have been liable to damages for its breach on the same principles and to the same extent as a private party, for *which a suitable remedy was provided by law in the jurisdiction conferred upon the Court of Claims. In this respect the relation between the parties was that of perfect equality in right.*"

Upon the facts found by the court below, the liability of the defendants to pay for the plans accepted and used by them has been repeatedly held by this court.

When the Government takes possession of property without any express contract and uses it, the Government is properly charged with its value.

United States *v.* Russell, 13 Wall., 630;
Solomon *v.* The United States, 19 Wall., 17;
United States *v.* Gill, 20 Wall., 517;
Hollister *v.* Benedict & Co., 113 U. S., 67.

The act of 1886, directing—

"The construction of the building according to the plan submitted to the Joint Select Committee on Additional Accommodations for the Library of Congress," etc.

The acceptance and use of the plans as found by the court below:

"Since October, 1886, the library building has been and still is in process of construction according to the plan designated by the act of 15th of April, 1886, modified by the act of March, 1889, as is more fully set forth in the preceding findings." (Finding 15.)

And the case of the Great Falls Manufacturing Co. (112 U. S., 645) determines the liability of the Government.

In this case the United States, under an act of Congress, took the land and water-rights of the company in aid of supplying the cities of Georgetown and Washington with water.

This court, speaking through Justice Harlan, says:

"We are of the opinion that the United States having, by its agents, proceeding under the authority of an act of Congress, taken the property of the claimant for public use, are under an obligation inferred by the Constitution to make compensation. The law will imply a promise to make the required compensation, when property to which the Government asserts no title is taken, pursuant to an act of Congress, as private property to be applied for public uses, such an implication being consistent with the constitutional duty of the Government as well as with common justice. The claimant's cause of action

is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims of actions founded upon contract, express or implied, with the Government of the United States."

It can not be that it requires argument or citation of authority to prove that if the Government of the United States, desiring to construct a building, requests an architect to prepare plans and drawings for the building, and then uses the plans and constructs the building according to the plans furnished, the Government is liable for the value of the plans.

The court below found and held the liability of the Government; but erred in the measure of damages upon which the claimants were entitled to recover. The court held they should recover upon the *quantum meruit*. We submit this is not the legal measure of damage in this case.

Third. The question then is as to the amount of compensation the claimants should receive for their services in preparing the plans in question.

Should their compensation be measured by the general rule and usage which govern the compensation of architects, and according to the schedule of charges for the Institute of Architects in this country; or according to the rule of *quantum meruit?*

Justice Nott, in delivering the opinion of the court below, said, upon this question:

"Speaking for myself alone, I am of the opinion that compensation should be measured by the general rule and usage which govern the compensation of the profession. I think that in legal effect the claimants proffered their plans to Congress, through the intervention of the joint select committee, for inspection, coupled nevertheless with the implied condition that if they were used, their services should be paid for, as like ser-

vices are paid for by other persons; that when Congress adopted the design by the act of 1880, the case reached the condition of Tilley *v.* County of Cook (*supra*); and that when the defendants proceeded to give effect to the statute by actually using the plans in the erection of a building after their design, the case entered the third stage, in which, as the Supreme Court intimates, the legal liability of the employer at last becomes fixed and the obligations to pay for the service becomes legally binding. I think, too, that the decisions of the Supreme Court holding that the usage of architects extends to and is binding upon a body-politic erecting a public building, Tilley *v.* County of Cook (*supra*); and that it has a recognized and established existence in the District of Columbia (District of Columbia *v.* Cluss, 103 U. S. R., 705), are authority for holding the usage obligatory upon the Government for a building erected in the city of Washington. The sum which would be recovered is large ($136,355), but the services embodied in these plans extended through the best part of these men's professional lives, and the risk which they ran was immense. From October, 1874, when they began to give their time to the Congressional committees and commissions, until October, 1886, when the work of construction actually began, no liability had fallen upon the defendants, and no remuneration had been given to the claimants who had fought through these twelve years against the professional competition of the whole world. The undertaking was a game of chance in which they staked their business lives; and they having won, the other party which had the benefit of the exemption and of the competition and which chose to do business in that way, should not, in my judgment, grudge them the prize.

"But the majority of the judges are of the opinion that the acts of the parties indicate that the services should be estimated according to the rule of *quantum meruit*, and not according to the schedule of charges of the Institute of Architects. According to that schedule the claimants would be entitled to $2\frac{1}{2}$ per cent. up to the point where the suit brings their service, and to another $2\frac{1}{2}$ per cent. if that service should continue until the completion of the building."

We submit that upon this question the majority of the court erred. They give as a reason for thus holding, as appears by the opinion of the court, that "the defendants *elected to give and the claimants to take two annual salaries amounting to $8,000 per year* as an equivalent for the percentage they would be entitled to according to the schedule."

There was nothing in the evidence and there is nothing in the findings to justify this statement. It nowhere appears that any agreement, express or implied, was entered into to this effect. The findings upon this point are, Finding XI, and Additional Findings I and III, R., pp. 9 and 14:

"On the 1st October, 1886, the commission created by the act of 15th April, 1886, appointed the claimant, John L. Smithmeyer, architect of the Library building, and fixed his compensation at $5,000 per annum. On the 13th November, 1886, the commission also appointed the claimant, Paul J. Pelz, principal draughtsman, and fixed his compensation at $3,000 per annum. The appointments were in writing. Mr. Smithmeyer continued in the service of the defendants as architect of the Library building until October 3, 1888, when he was removed by the Chief of Engineers. Mr. Pelz is still employed. The claimants at the time of accepting such appointments did not notify either Congress or the commission that they intended to charge according to the schedule of the Institute for the plans furnished, nor did they so notify Congress or the commission before the work began on the building under the act of 1886, but had previously notified the chairman of the joint select committee that they intended to charge for the plans." (Finding XI.)

"Subsequently, and on the 13th day of November, 1886, the commission employed the claimant, Pelz, as principal draughtsman of the building, and agreed to pay him $3,000 per annum. The claimants were not employed as a firm, and neither had any interest in the employment of the other or in the services to be ren-

dered by the other, or in the compensation to be paid for such services. Their employment related solely to service to be rendered by them in the future construction of the building and no other." (Add. Finding I.)

"The acceptance of the salaries by Smithmeyer and by Pelz were the only acts, as far as appears, done by them or either of them, or agreements, express or implied, between them and the defendants or the commissioners relative to their compensation as architects, either for preparing the plans or superintending the work." (Add. Finding III, p. 19.)

There is nothing in these findings which shows that the claimants did anything by which it could even be inferred that they accepted their salaries in lieu of what they would have been entitled to, had they superintended the construction of the building. They had already completed their plans. Their work in preparing the plans had been completed prior to the act of April, 1886. The act of 1886 accepted the plans and took the charge and superintendence of the construction of the building out of their hands and placed it in the hands of the commission appointed by that act, and discharged the claimants. This was eight months before the employment of Mr. Smithmeyer, and nine months before the appointment of Mr. Pelz. During this time, the claimants were in no sense in the employ of the Government.

They had finished their plans, the Government had accepted them and discharged them from further connection with the work. It might be argued that the Government had no right to discharge them; that, having prepared the plans, they had the right to continue in the superintendence of the work until the building was completed. But however this may be, they were discharged and ceased their connection with the building.

The *firm* was not employed by the commission. One was employed in October and the other in November. One on a salary of $5,000, and the other of $3,000 per

annum. How could the employment of Mr. Smithmeyer with the title of architect—not to superintend the construction of the building, but in reality clerk to the commission—aid in fixing the value of the plans? Or the employment of Mr. Pelz as draughtsman? Why should the fact that one received $5,000 and the other $3,000 aid in determining the value of the plans prepared by the *firm*, supposing that Mr. Smithmeyer had been appointed and Mr. Pelz had not been? Would the fact that he received $5,000 for his salary furnish any reason why the Government should have paid as the value of the plans at the rate of $5,000 a year for six years' service, viz., $30,000? Or if Mr. Pelz had been employed at $3,000 a year and Mr. Smithmeyer had not been employed, is that any reason why the value should be determined at $3,000 per year for six years, viz., $18,000? They were separately employed. Neither was interested in the amount the other received. They took their appointment for the reason that they had been discharged. Their work had been placed in other hands. They were powerless to resist or contend with the Government.

They had given their "professional talent, skill, experience, study, effort, and labor" for the best part of their lives in designing and producing the plans which the Government were using. To be discharged from their positions as architects would ruin their professional standing and reputation. It would prevent their names from going into history as the architects of the largest and finest library building in the world—a building which had attracted the attention of the architectural profession in this and the old country, the design of which shows it to be the most beautiful and ornamental building in this country. This alone furnishes sufficient reason why they should accept the appointment at the hands of the commission on any terms the commission might be pleased to offer.

They continued in their employment until Congress, by the act of 1888, placed Gen. Casey in charge of the work, when one of them, Mr. Smithmeyer, was discharged from the position given to him by the commission. Mr. Pelz was retained in his position as draughtsman.

If the rule of *quantum meruit* is to prevail in this case and the amount the claimants deserve to receive as compensation is to be determined upon the amount of the salaries they jointly received after their discharge by the commission, why should the amount be limited by the court to six years? The court below found, "from the year 1873 until the 15th of April, 1886, the claimants devoted their time as architects in the making of plans and drawings for a building for the Library of Congress." (Finding II, p. 3.)

The court in its opinion say that the plans were submitted in 1881. In the findings the court say that "at the request of the committee in 1885 or 1886 two new designs were prepared by the claimants in the same style of architecture and submitted by them." (Finding IV, par. 10, R., p. 5.) Again, in Finding V the court say, "claimants in the year 1874 gave up their private business as architects, and from that time on until 1886 devoted themselves almost exclusively to the preparation of the plans above described, and up to the time of the commencement of this suit they had not regained their private business." (Finding V, R., p. 6.)

The court found the plans were not adopted until 1886. (Finding VI.)

In Finding XI, p. 10, the court further say, "during the preceding twelve years—that is to say, from October, 1874, to April 15th, 1886—the claimants had given substantially their whole time to the service of the committees and commissions having charge of the subject of a Library building." There was nothing in the evidence, and there is nothing in the facts found by the court, to

justify the court in limiting the time of the employment of the claimants to six years.

If the claimants are entitled to recover upon the basis of the salaries received by them, we submit that they are entitled to recover for a period of twelve years—the time which they were found by the court to be employed by the defendants. This, at $8,000 per year, would amount to the sum of ninety-six thousand dollars, instead of forty-eight thousand dollars.

And we further submit, in considering their right to recover upon this basis, that there should be added to the value of their service as thus found their office expenses during this time. The court found: "It has been shown that the cost of draughtsmen, clerks, and office rent is usually about 50 per cent. of the gross receipts of an architect's business." (Finding XI, R., p. 10.) That is, the claimants were compelled to pay during this time office expenses 50 per cent. of the amount received. If they were entitled to this sum it would amount to forty-eight thousand dollars, making the sum which the court should have found for the claimants one hundred and forty-four thousand dollars.

Again, to show the impracticability of the measure of damages as applied to cases like the one under consideration, assume that the plans had been prepared without change; that but one plan had been prepared and accepted and used. Such plan could have been prepared in one year—perhaps in less time. To estimate the value on the basis adopted by the court below would give the defendants the plans for a library building—a monumental building—at a cost to them of $8,000; whereas, as the court found, if the plans had been prepared in the Supervising Architect's office of the Treasury they would have cost the Government 2½ per cent. of the cost of the building. (Finding XI, par. 2, R., p. 10.)

We submit, then, that the measure of damages to be adopted in this case should be the value of the plans, to be measured by the general custom and usage of the profession of architects in this country.

By adopting this rule, a mode of ascertaining damages in like cases, a uniform practice is established which is reasonable and practicable, and calculated to promote the interests of the parties engaged in the business to which they are applied and the interests of the community affected. It is a rule established by reason and authority, and the court below found plainly and clearly upon this question.

The usual and customary schedule of charges and the professional practice of architects, as prescribed by the American Institute of Architects (chartered under the laws of the State of New York, and of which both claimants are members), the Western Association of Architects, and other architectural societies, including the District of Columbia, and by the profession generally, fixes the rates of compensation and rules governing the same, as follows:

For full professional services (including supervision), 5 per centum upon the cost of the work.

The charge for partial service is as follows:

	Per cent.
Preliminary studies	1
Preliminary studies, general drawings, and specifications	2½
Preliminary studies, general drawings, specifications, and details	3½

* * * * * * *

These are the rates and rules established by the custom and usage of the profession, and are never deviated from by architects in good standing, except under exceptional circumstances, and then only by a special and express contract.

The plans under which the building for the Library of Congress is being constructed are designed and intended for a monumental building within the meaning of the paragraph of the foregoing schedule, which prescribes additional rates for such plans.

In a number of cases the executive branch of the Government has employed architects at the rates prescribed by the foregoing schedule of the American Institute. (Finding IX, R., p. 8.)

"The term custom and usage are now used interchangeably." (Bouvier's Law Dic., Title, Usage.)

This court has decided that "a general custom is a general law, and forms the law of the contract on the subject-matter, though at variance with its terms; it enters into and controls its stipulations as an act of Parliament or State legislature. (United States *v.* Arredondo and others, 6 Pet., 691, 714, citing 8 Wheaton, 591; 9 Wheat., 584, and cases there cited.)

The court further say:

"The court not only may, but are bound to notice and respect general customs and usage as the law of the land, equally with the written law, and when clearly proved, they will control the general law," etc.

Usages and customs respecting the alienation of lands have been held by this court to have, to a great extent, the efficacy of law.

In Slidell *v.* Grandpian, 111, U. S., 412, 421, this court, in delivering the opinion by Mr. Justice Field, said:

"Usages long established and followed have to a great extent the efficacy of law in all countries; they control the construction and qualify and furnish the force of positive enactment."

Evidence of custom is competent as to the manner of making wills on the question of the due execution of a will. (Adams *v.* Norris, 23 How., 353.)

In Robinson *v.* U. S., 13 Wall., 363, the court say:

"If a person of a particular occupation in a certain place makes an agreement by virtue of which something is to be done in that place, and this is uniformly done in a certain way by persons of the same occupation in the

same place, it is but reasonable to assume that the parties contracting about it, and specifiying no manner of doing it different from the ordinary one, meant that the ordinary one and no other should be followed. Parties who contract on a subject-matter concerning which known usage prevails, by implication incorporate them into their agreement, if nothing is said to the contrary."

See also—

Bliven *v.* New England Screw Co., 23 How., 420.

Evidence of this character is received for the purpose of ascertaining the sense and understanding of the parties by their contracts.

Mills *v.* Bank of U. S., 11 Wheat., 431;
Bank of Washington *v.* Littell, 1 Pet., 25;
Van Ness *v.* Packard, 2 Pet., 137;
Adams *v.* Odertruck, 15 How., 544.

In the case of Sewell *v.* Corp the question of usage as applicable to a particular trade or profession was decided by Best, Chief Justice

The witness was asked whether to his knowledge it was a custom to pay veterinary surgeons for attendance as well as medicines.

The question was objected to, and the Chief Justice said:

"They do not mean a custom whereof the memory of man runneth not to the contrary; but if there is a general usage applicable to a particular profession, parties employing an individual in that profession are supposed to deal with him according to that usage."

Sewell *v.* Corp, 1st Car., & P., p. 292.

In Gwin *v.* Charron, 15th Md., evidence of a custom among dry-goods jobbers in Baltimore, that when a clerk begins a season in the absence of or without special contract he can not be discharged until the end of the season, was offered.

The court on appeal held the evidence properly admitted.

Gwin *v.* Charron, 15th Md., 502, 508.

In 44th Md., it was held that—

"In the absence of a special contract, when services are rendered, and a uniform usage is shown to exist in regard to such services, it will be presumed that they are rendered in accordance with the usages, and in an action to recover for such service evidence of the existance of the usage is admissible."

And it was further held that—

"The party claiming under the usage is under no legal obligation to offer proof that the usage was known to the other party. That will be presumed."

Lyon & Scott *v.* George, 44 Md., 295.

In Walls *v.* Bailey, which was an action to recover a balance due for plastering the defendant's house, the court said:

"Every legal contract is to be interpreted in accordance with the intention of the parties making it. And usage, when it is reasonable, uniform, well settled, not in opposition to fixed rules of law, not in contradiction of the express terms of the contract, is deemed to form a part of the contract, and to enter into the intention of the parties."

Walls *et al. v.* Bailey, 49 N. Y., 464, 9;
Boorman *v.* Johnston, 12 Wend., 573.

In the case of Lowe *v.* Lehman, 15 Ohio State, 179, the court held it was proper to prove a local custom among brick-layers to estimate the number of brick laid by measurement of the walls.

The same was held in Massachusetts in Ford *v.* Terrill, 9 Gray, 401.

In Pennsylvania the court said in a suit to recover commissions for the sale of coal: "Usages, in the absence of any express stipulation inconsistent therewith, may be supposed to have entered into the understanding of the parties in making the contract."

Carter *v.* Philadelphia Coal Co., 77 Pa. Stat., 286;
Mayor, Aldermen, etc., *v.* Thomas, 1 Pa. Stat., 342;
Ray *v.* Shaw, 32d Ill., 295;
Codman *v.* Armstrong, 28 Me., 91;
Queen *v.* Doutre, 9 Appeal Cases, P. C., 83, 89.

The court in this case say:

"The respondent is a member of the Quebec section of the bar of Lower Canada, and it was in that capacity that he was retained by the government as one of their counsel before the Fisheries Commission. * * *

"When an advocate or other skilled practitioner is by law and the custom of his profession entitled to claim and recover payment for his professional work, those who engage his services must, in the absence of any stipulation to the contrary, express or implied, be held to have employed him upon the usual terms according to which such services are rendered."

In the District of Columbia *v.* Cluss, 103 U. S., 705, Mr. Cluss was employed by the District of Columbia to prepare the plans and specifications for a school house in Washington and to superintend its construction, the District agreeing to give him for his services 5 per cent. upon the cost of the building.

Mr. Justice Field, in delivering the opinion of the court, said:

"This was the ordinary rate of charge as compensation for similar service in the District."

The judgment of the court below in favor of Cluss for that sum was affirmed.

Tilley *v.* County of Cook was an action upon the common counts and account stated to recover the value of plans furnished by Tilley, an architect, for the construction of a court-house and city hall in the city of Chicago.

Judgment was for the defendant and affirmed by this court for the reason that no contract, express or implied, was shown by the plaintiff.

Evidence was offered to show the usage and custom of architects, but the evidence was rejected for the reason that no contract, express or implied, was shown; but this court, in its opinion, said:

"If the plaintiff had offered to show that after the passage of the resolution by which his plan was accepted the defendants had erected their building according to his plans, then the evidence of the custom would have been pertinent."

Tilley *v.* County of Cook, 103 U. S., 155, 163.

The question then remains as to the cost of the building.

The court below expressed their opinion of the value of the plans, upon a statement submitted to Congress by Mr. Smithmeyer in 1886. In that statement he said:

"The approximate estimate of the cost of completing the structure made from the drawings on hand at this date * * * will be $3,262,000, and the cost of completing such portions of the inside for occupation as will accommodate one million books will be $2,323,600."

Finding X, par. 5, p. 8.

This, it will be seen, was an *approximate* estimate merely, and made at a time before it had been determined of what material the building was to be constructed, so that it was impossible to determine with any degree of accuracy the cost of the building, which, of course, the defendants knew. They didn't ask the

claimants for a detailed statement of the cost, but were satisfied with an *approximate estimate*, which could not afford evidence of the actual cost. The question is not what the claimants estimated the cost to be, *but what is the cost?* Some evidence upon this point may be found in the fact that Congress has appropriated more than the sum estimated by the claimants. The act of April, 1886, appropriated the sum of five hundred thousand dollars.

The act of 1888 provides "for the building for the Library of Congress, * * * five hundred thousand dollars;" and the act of 1889 enacts that the building shall be constructed "in accordance with the plans marked D," which are the claimants' plans, "at a total cost therefor not exceeding five million five hundred thousand dollars exclusive of appropriations heretofore made."

These provisions in these acts fix the cost at $6,500,000.

The estimate of General Casey, made in his report to Congress under date December 1, 1888, fixes the cost of the building under plan D at $6,003,140. It will be borne in mind that this report was made nearly three years after the "approximate estimate" made by Mr. Smithmeyer, and at a time when the material for the building had been determined upon, and when it was and had been for a long time in process of construction.

But the cost of the building is definitely determined by the court below in Finding 8. In this finding the court say that General Casey reported the building as being constructed at a cost of $6,003,140, according to plan D, being the claimants' plans, modified by omitting certain interior work, which would cost $1,000,000. This, added to the cost as reported by General Casey, would make the cost of the building $7,003,140. From this deduct the cost of the specifications, which had not been submitted for the reason that the kind of building and style of fin-

ish had not been fixed upon by Congress, the reasonable value of which the court found to be $3,300, and it shows the cost upon which the claimants were entitled to judgment to be $6,999,840.

Upon this ground they are entitled, according to the usage and custom of their profession, to 2½ per cent., amounting to $174,995.

Fourth. The fourth point needs no citation of authority and has been already referred to in argument.

Fifth. The act of 1888 provided, among other things, that "the value of the plans for a Library building submitted to the Joint Select Committee on Additional Accommodations for the Library of Congress by John L. Smithmeyer, in the Italian renaissance style of architecture, may be adjusted and determined by the Secretary of the Interior, to be paid out of the sums heretofore or hereby appropriated." (See Appendix, act of Cong. of 1888.)

At the time of the acceptance and adoption of the plans by the act of April, 1886, the defendants had a right to bring suit to recover payment for their value in the Court of Claims under the act conferring jurisdiction upon that court—giving it jurisdiction "upon any contract, express or implied, with the Government of the United States."

Section 707 of this act gave the right of appeal to the Supreme Court of the United States from all judgments adverse to the United States, etc.

By act of Congress approved March 3, 1887, an act was passed known as the Tucker Act, which reaffirmed the jurisdiction of the Court of Claims upon all claims "founded upon contracts, express or implied, with the Government of the United States." (Sup. to R. S., p. .)

By act approved March 3, 1891, Congress passed what is known as the Indian Depredation Act, and provided "*that in addition to the jurisdiction which now is* or may hereafter be conferred upon the Court of Claims said court shall have," etc.

The claimants then, at the time of filing their petition, had a right of action to enforce payment for the value of their plans unless such right was taken away by the act of 1888. They had this right under the general jurisdiction act, and under the act of 1887, which was passed after their right of action had accrued.

The act of 1891 also gave them a right of action to enforce their claim. It said: "*That in addition to the jurisdiction which now is.*" The jurisdiction at that time conferred was upon all actions upon contracts, express or implied, and the language of the act reaffirmed the right of the claimants which existed prior to the act of 1888, and re-established the claimants in their remedy if the act of 1888 took it away.

The acts conferring jurisdiction upon the Court of Claims gave the claimants the right to file their petition, to subpœna and compel the attendance of witnesses, to compel the production of books and papers, to hear the testimony of defendants' witnesses and cross-examine them, to submit the case by argument to the court, to hear the argument of opposing counsel and to reply thereto, and in event of being dissatisfied with the judgment of the court, gave him a right of appeal to this court.

The act of 1888 simply said the value of the plans "may be adjusted and determined by the Secretary of the Interior."

The Secretary had no power to take testimony, to compel the attendance of witnesses—in short, he had no *judicial* power whatever; he acted *ministerially*—there was no appeal from his decision. He was to determine the amount due the claimant by an adjustment made by

him. Webster defines the word *adjust*, "to settle or bring to a satisfactory state so that parties are agreed in the result."

The resolution in this case simply says the value of the plans *may* be adjusted.

How was it possible that the Secretary could have taken the statement of the claimants or others regarding the rights of the parties in this case covering a period of thirteen years, and then have *agreed* with the claimants as to the amount to which they were entitled? Even the Court of Claims, after spending over a year in taking testimony, a week in presenting and arguing the case, have failed to bring about a result satisfactory to the parties in interest. We submit that if Congress had intended to have hindered and delayed the claimants in recovering compensation for the value of their plans they could not have succeeded better than by compelling them to submit their claim as proposed to the Secretary of the Interior.

We further submit that the United States having taken the plans of the claimants and used them, they have, as this court said in 112 U. S., *supra*, a cause of action against the defendants arising out of an implied contract. Nothing remained for them to do; their right became a vested right, and the right to enforce it under any law then existing which afforded him an adequate remedy.

Bronson *v.* Kinzie, 1st of Howard, 311.

In this case Mr. Kinzie executed a mortgage to Bronson in 1838. In 1841 Bronson filed his bill to foreclose. Between the execution of the mortgage and the filing of the bill, the legislature giving a right of redemption to mortgagors, another act was passed which impeded and delayed the mortgagee in obtaining possession under his decree in the foreclosure suit. Ch.-J. Taney said:

"Whatever belongs merely to the remedy may be altered according to the will of the State, provided the

alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by action on the remedy or on the contract itself."

And he further said:

"But it is manifest that the obligation of the contract and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing. And no one, we presume, would say that there is any substantial difference between a retrospective law declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them or encumbered it with conditions that rendered it useless and impracticable to pursue it." Citing 1 Black. Com., p. 55.

In McCracken *v.* Hayward, 2 How., 608, 612, the court say:

"If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contractor in favor of one party to the injury of the other; hence, any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution."

In the case of Steamship Co. *v.* Joliffe, 2 Wall., 450, 457, Mr. Justice Field, in delivering the opinion of the court in a case where a right had arisen upon a contract, and so far perfected that nothing remains to be by the party asserting it, said: "The repeal of the statute does not affect it or an action for its enforcement. It has become a vested right which stands independent of the statute."

In Edwards *v.* Kearzy, 96 U. S., 595, 600, the court says:

"The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the success of its enforcement. This is the breath of its vital existence. * * * The ideas of right and remedy are the same thing."

Congress, as has been said, had given the claimants the right to bring suit against the United States upon their contract. This right Congress could take away by repealing the law giving the right. They have not done so in this case.

So far as the rights of the claimants in this regard are concerned they stand unaffected by the act of 1888. That act contained no repealing clause, and while they might have gone to the Secretary of the Interior with their claim it was not obligatory upon them to do so, and certainly it should not be required of them that they submit their claim to an officer who could not act judicially in determining and enforcing their rights, when a tribunal was open to them where both their rights and those of the Government could be fully and satisfactorily adjudicated.

It is admitted that the act conferring jurisdiction upon the Court of Claims has not been repealed expressly or by direct terms. Unless repealed by necessary implication they are both in force. The statute of 1888 says, in effect, that the Secretary of the Interior may adjust and determine the value of the plans. The act establishing the Court of Claims says the claimants may sue the United States for the value of their plans, have their case tried, and gives them the right of appeal.

The objects of the two statutes must be the same, otherwise, in the absence of a repealing clause, the former will stand; that they be not the same is evident. One gives a right of action to enforce the claim, and the other the right to settle with the Secretary of the Interior.

In the case of United States *v.* Claflin, 97 U. S., 546, 552, the court said:

"It is, however, necessary to the implication of a repeal that the objects of the two statutes are the same, in the absence of any repealing clause. If they are not, both statutes will stand, though they may refer to the same subject."

We submit that the rights of the Government are better protected by allowing the claimants to proceed as they have under the former statute.

In Wood *v.* The United States, 16 Pet., 342, 362, the court, by Mr. Justice , says:

"That it" (the statute) "has not been directly or by express terms repealed is admitted, and the question resolves itself into the more narrow inquiry, whether it has been repealed by necessary implication. We say by necessary implication, for it is not sufficient to establish that subsequent laws cover some or even all of the cases provided for by it; for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new law and those of the old, and even then the old law is repealed by implication only *pro tanto*, to the extent of the repugnancy."

In Chicago, Mil. & St. Paul R. R. Co. *v.* United States, the court said:

"When there are two acts or provisions of law relating to the same subject, effect is to be given to both if that be practicable."

We submit that it is practicable to give effect to both statutes, and that the practical business-like way to adjudicate the questions between the parties is in the courts.

But further citation of authority or argument upon this point is, we think, unnecessary.

The court below did not consider the question important, as it did not enter into their opinion. It is only

material, we submit, as showing an admission of an obligation on the part of the defendants to pay the value of the plans.

J. COLEMAN,
Attorney for Appellants.

APPENDIX.

1. The first enactment relating to a new building for the Library of Congress is contained in the sundry civil appropriation act for the fiscal year ending June 30, 1874, approved March 3, 1873 (17 Stat. L., 510, 513).

This enactment is in the following words:

"For a plan for a new building for a Library of Congress, five thousand dollars, and the selection of a plan, together with the location and supervision of said building, shall be in charge of a commission to consist of the chairman of the Joint Committee on the Library, the chairman of the Committee on Public Buildings and Grounds of the Senate, and the Librarian of Congress."

The next enactment relating to the building is in the following words:

"To enable the Joint Committee on the Library of Congress to procure plans for the accommodation of the Library, $2,000. (Sundry civil appropriation act, for the fiscal year ending June 30, 1875, approved June 23, 1874, 18 Stat. L., 204, 226.")

The next enactment rela ting to thebuilding is in the following words:

* * * "the unexpended balance of one thousand dollars appropriated by the act for sundry civil expenses for the fiscal year eighteen hundred and seventy-five, to enable the Joint Committee on the Library of Congress to procure plans for the accommodation of Library is hereby re-appropriated and mad[e] available for said

purpose. (Legislative appropriation act for the fiscal year ending June 30, 1887, approved August 15, 1876, 19 Stat. L., 143, 168.")

The next legislation on the subject reads as follows:

"That the two chairmen of the Joint Committee on the Library of Congress on the part of the Senate and House, the chairman of the Senate Committee on Public Buildings and Grounds, the chairman of the House Committee on Public Buildings and Grounds, and the Librarian of Congress be, and they are hereby, constituted a commission to consider the whole subject of providing enlarged accommodation for the Library of Congress, and to report a plan for such accommodations, together with an estimate of the cost.

"SEC. 2. That the sum of twenty-five hundred dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, for procuring such plans as the Commission may prescribe in furtherance of the provisions of this act. (Act of April 3, 1878, chap. 49, 20 Stat. L., 35.)

The sundry civil appropriation act for the fiscal year ending June 30, 1879, approved June 20, 1878 (20 Stat. L., 206, 225), instructed the Secretary of the Interior to ascertain the probable cost of land adjoining the Capitol grounds for a proper site for the Congressional Library, and to report to Congress on the first day of the next session.

The act of June 8, 1880, chapter 133 (21 Stat. L., 165), reads as follows:

"That a joint select committee, consisting of three Senators and three members of the House of Representatives, shall have power to employ, as soon as may be, at the expense of the United States, three persons of suitable skill and attainments, who, or a majority of whom, shall, with the approval of said committee, carefully examine and consider what practical and beneficial changes can be made in and of the Capitol build-

ing in the District of Columbia, for the better accommodation of the Houses of Congress and of the Congressional Library, having in view especially the need of better ventilation, light, and exposure to the open air of the legislative halls, and the convenience of communication between them, and between them and the library, and the need of greater space and better arrangement thereof for the library. They shall, if they find any mode of accomplishing the ends aforesaid practicable and beneficial, cause proper plans, designs, and estimates of cost to be made thereof and submit the same to said committee, which shall report the same to Congress at the earliest practicable time. And said committee shall in any case make a full report on the subject, and especially whether such mode of providing for the library is preferable to the erection of a separate building for that purpose.

"SEC. 2. That said joint select committee is also authorized and directed at the same time to examine the question of a site outside the Capitol for the Library of Congress, and report to Congress what locations would be most suitable for the library and afford the highest advantages for its future growth and permanent accommodation, and also in the case of each site the probable cost of the same and of the building.

"SEC. 3. The sum of five thousand dollars, or so much thereof as shall be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, for the purposes named in this act, which shall be paid on vouchers approved by said committee."

The deficiency appropriation act of March 3, 1881 (21 Stat. L., 414, 424), contains the following appropriation for the purposes of the last above quoted act of June 8, 1880:

"To enable the Joint Select Committee on Additional Accommodations for the Library of Congress to complete the payment for plans, designs, and other expenses incurred, three thousand dollars, or so much thereof as may be necessary."

The act of April 15, 1886, chapter 50 (24 Stat. L., 12), entitled "An act authorizing the construction of a building for the accommodation of the Congressional Library," is as follows:

The act of Congress in the sundry civil act of October 23, 1888, (25 Stats. L., 505, 523):

"For the building for the Library of Congress, as herein provided for, and for each and every purpose connected therewith, including the cost of all professional and other personal services that the Chief of Engineers of the Army may deem necessary for the work and shall specially order, five hundred thousand dollars.

"This appropriation and all appropriations hereafter made, and all sums available from appropriations heretofore made for this purpose shall be expended under the direction and supervision of the Chief of Engineers of the Army, who shall have the control and management of all of said work and the employment of all persons connected therewith. And all contracts for the construction of said building, or any part thereof, shall be made by the Chief of Engineers of the Army, and so much of the act entitled "An act authorizing the construction of a building for the accommodation of the Congressional Library," approved April fifteenth, eighteen hundred and eighty-six, as requires the construction of said building substantially according to the plan submitted to the Joint Select Committee on Additional Accommodations for the Library of Congress by John L. Smithmeyer, and so much of the first section as provides for a commission, together with the eighth section of said act, be, and the same are hereby, repealed, and the duties of said commission under said act are hereby devolved upon the Chief of Engineers of the Army, who shall annually report to Congress at the commencement of each session a detailed statement of all the proceedings under the provisions of this act, and hereafter, until otherwise ordered by Congress, no work shall be done in the construction of said library except such as is herein provided for, and all contracts for work or materials not necessary for the execution of the work contemplated herein are hereby rescinded. And all loss or damage occasioned

thereby or arising under said contracts, together with the value of the plan for a library building submitted to the Joint Select Committee on Additional Accommodations for the Library of Congress by John L. Smithmeyer in the Italian renaissance style of architecture, may be adjusted and determined by the Secretary of the Interior, to be paid out of the sums heretofore or hereby appropriated: *Provided*, That before any further contracts are let for the construction of said building general plans for the entire construction thereof shall be prepared by or under the direction of the Chief of Engineers of the Army, which plans shall be subject to the inspection and approval of the Secretary of War and the Secretary of the Interior: *And provided further*, That the total cost of said building shall not exceed four million dollars exclusive of appropriations heretofore made."

The *sundry civil act* of March 2, 1889 (25 Stats. at L., 939, 936), relating to the Library of Congress:

"For the building for the Library of Congress, as authorized by the sundry civil appropriation act approved October second, eighteen hundred and eighty-eight, except as herein modified, and for each and every purpose connected therewith, five hundred thousand dollars. And said building shall be constructed in accordance with the plans marked 'D,' submitted by the Chief of Engineers with his annual report to Congress, being Miscellaneous Document number twelve, Fiftieth Congress, second session, and at a total cost therefor not exceeding five million five hundred thousand dollars exclusive of appropriations heretofore made, and no changes or modifications shall be made that will increase the cost above the limitation herein prescribed: *Provided*, That contracts may be entered into for all the stone required for the exterior walls of said building to be paid for as appropriations may from time to time be made by law."

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CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

JOHN L. SMITHMEYER AND PAUL J. PELZ, appellants,
vs.
THE UNITED STATES.
No. 645.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

JOHN L. SMITHMEYER AND PAUL J. PELZ, appellants,
vs.
THE UNITED STATES.
No. 645.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

The appellants recovered a judgment in the court below for the reasonable value of their services as architects in connection with the plan for the building now in course of construction and known as the Library of Congress.

The amount of such judgment was $48,000. The United States has prosecuted no appeal, and, if the question of jurisdiction raised in the court below, and appearing upon the face of the record, is decided adversely to the United States, we are content that the judgment below shall be affirmed.

The appellants demand a much larger sum and have prosecuted this appeal, as we contend, without other reason than to cause a reversal upon the weight of the evidence. At the same time the evidence is not in the record, as it could not be. The finding of the court below is explicit that $48,000 is "the fair and reasonable value of the claimants' services in preparing the plans delivered to the joint select committee and reported to Congress on the 14th of January, 1881, and which are now being used by the Government in the construction of a library building." (Finding XVI, record, page 13.)

Because the court found other facts in a loose and disjointed manner, to the effect that one of the claimants did a great amount of work probably tending to the enlightenment of certain committees of Congress and members thereof, in connection with *other plans not adopted*, and for which they were paid certain sums appropriated by Congress for the use of these committees from time to time, this court is asked, without the evidence, to reverse the judgment of the court below as to the reasonable value of *the plan which was adopted*, and for which latter only the right to compensation is granted by Congress.

We first discuss the claim upon its merits, leaving the jurisdictional question for later consideration.

As preliminary to our argument we print the legislation of Congress upon the subject of a Library of Congress.

The first enactment relating thereto is contained in the sundry civil appropriation act for the fiscal year ending June 30, 1874, approved March 3, 1873. (17 Stat. L., 510, 513.)

This enactment is in the following words:

> For a plan for a new building for a Library of Congress, five thousand dollars, and the selection of a plan, together with the location and supervision of said building, shall be in charge of a commission to consist of the chairman of the Joint Committee on the Library, the chairman of the Committee on Public Buildings and Grounds of the Senate, and the Librarian of Congress.

The next enactment relating to the building is in the following words:

> To enable the Joint Committee on the Library of Congress to procure plans for the accommodation of the Library, $2,000. (Sundry civil appropriation act for the fiscal year ending June 30, 1875, approved June 23, 1874, 18 Stat. L., 204, 226).

The next enactment relating to the building is in the following words:

> * * * the unexpended balance of one thousand dollars appropriated by the act for sundry civil expenses for the fiscal year eighteen hundred and seventy-five, to enable the Joint Committee on the Library of Congress to procure plans for the accommodation of Library is hereby reappropriated and mad[e] available for said purpose. (Legislative appropriation act for the fiscal year ending June 30, 1887, approved Aug. 15, 1876, 19 Stat. L., 143, 168.)

The next legislation on the subject reads as follows:

> That the two chairmen of the Joint Committee on the Library of Congress on the part of the Senate and House, the chairman of the Senate Committee on Public Buildings and Grounds, the chairman of the House Committee on Public Buildings and Grounds, and the Librarian of Congress be, and they

> are hereby, constituted a commission to consider the whole subject of providing enlarged accommodation for the Library of Congress, and to report a plan for such accommodations, together with an estimate of the cost.
>
> SEC. 2. That the sum of twenty-five hundred dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, for procuring such plans as the Commission may prescribe in furtherance of the provisions of this act. (Act of April 3, 1878, chap. 49, 20 Stat. L., 35.)

The sundry civil appropriation act for the fiscal year ending June 30, 1879, approved June 20, 1878 (20 Stat. L., 206, 225), instructed the Secretary of the Interior to ascertain the probable cost of land adjoining the Capitol grounds for a proper site for the Congressional Library, and to report to Congress on the first day of the next session.

The *Act of June* 8, 1880, chapter 133 (21 Stat. L., 165), reads as follows:

> That a joint select committee, consisting of three Senators and three members of the House of Representatives, shall have power to employ, as soon as may be, at the expense of the United States, three persons of suitable skill and attainments, who, or a majority of whom, shall, with the approval of said committee, carefully examine and consider what practical and beneficial changes can be made in and of the Capitol Building in the District of Columbia, for the better accommodation of the Houses of Congress and of the Congressional Library, having in view especially the need of better ventilation, light, and exposure to the open air of the legislative halls,

and the convenience of communication between them, and between them and the Library, and the need of greater space and better arrangement thereof for the Library. They shall, if they find any mode of accomplishing the ends aforesaid practicable and beneficial, cause proper plans, designs, and estimates of cost to be made thereof, and submit the same to said committee, which shall report the same to Congress at the earliest practicable time. And said committee shall in any case make a full report on the subject, and especially whether such mode of providing for the Library is preferable to the erection of a separate building for that purpose.

SEC. 2. That said joint select committee is also authorized and directed at the same time to examine the question of a site outside the Capitol for the Library of Congress, and report to Congress what locations would be most suitable for the Library and afford the highest advantages for its future growth and permanent accommodation, and also in the case of each site the probable cost of the same and of the building.

SEC. 3. The sum of five thousand dollars, or so much thereof as shall be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, for the purposes named in this act, which shall be paid on vouchers approved by said committee.

The deficiency appropriation act of March 3, 1881 (21 Stat. L., 414, 424), contains the following appropriation for the purposes of the last above quoted act of June 8, 1880:

To enable the Joint Select Committee on Additional Accommodations for the Library of Congress

to complete the payment for plans, designs, and other expenses incurred, three thousand dollars, or so much thereof as may be necessary.

The first section of the act of April 15, 1886, chapter 50 (24 Stat. L., 12) entitled "An act authorizing the construction of a building for the accommodation of the Congressional Library," reads as follows:

> That a fireproof building, for the accomodation of the Library of Congress, shall be erected east of the Capitol, and either between B street north and East Capitol street and First street east and Second street east, or between B street south and East Capitol street and First street east and Second street east, and as the commission hereinafter provided shall determine; and the construction of said building, substantially according to the plan submitted to the Joint Select Committee on Additional Accommodations for the Library of Congress, by John L. Smithmeyer, in the Italian renaissance style of architecture, with such modifications as may be found necessary or advantageous, without materially increasing the cost of the building, shall be in charge of a commission composed of the Secretary of the Interior, the Architect of the Capitol Extension, and Librarian of Congress, who shall be authorized and directed to make contracts for the construction thereof, after proper advertisements and the reception of bids; and the sum of five hundred thousand dollars is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to commence the construction of said building; and the moneys appropriated for said building shall be disbursed by the Secretary of the Interior.

The other sections of this act have no relation to the matters in issue in this suit.

The *Sundry Civil Act of October* 2, 1888 (25 Stat. L., 505, 523), contains the following provisions:

> For the building for the Library of Congress, as herein provided for, and for each and every purpose connected therewith, including the cost of all professional and other personal services that the Chief of Engineers of the Army may deem necessary for the work and shall specially order, five hundred thousand dollars.
>
> This appropriation and all appropriations hereafter made, and all sums available from appropriations heretofore made for this purpose, shall be expended under the direction and supervision of the Chief of Engineers of the Army, who shall have the control and management of all of said work and the employment of all persons connected therewith. And all contracts for the construction of said building, or any part thereof, shall be made by the Chief of Engineers of the Army, and so much of the act entitled "An act authorizing the construction of a building for the accommodation of the Congressional Library," approved April fifteenth, eighteen hundred and eighty-six, as requires the construction of said building substantially according to the plan submitted to the Joint Select Committee on Additional Accommodations for the Library of Congress by John L. Smithmeyer, and so much of the first section as provides for a commission, together with the eighth section of said act, be, and the same are hereby, repealed, and the duties of said commission under said act are hereby devolved upon the Chief of Engineers of the Army, who shall annually report to Congress at the commencement of each session a detailed statement of all the proceedings under the provisions of this act, and hereafter, until otherwise ordered by Congress, no work shall be done in the construction of said Library

except such as is herein provided for, and all contracts for work or materials not necessary for the execution of the work contemplated herein are hereby rescinded. And all loss or damage occasioned thereby or arising under said contracts, together with the value of the plan for a Library Building submitted to the Joint Select Committee on Additional Accommodations for the Library of Congress by John L. Smithmeyer, in the Italian Renaissance style of Architecture, may be adjusted and determined by the Secretary of the Interior, to be paid out of the sums heretofore or hereby appropriated: *Provided*, That before any further contracts are let for the construction of said building general plans for the entire construction thereof shall be prepared by or under the direction of the Chief of Engineers of the Army, which plans shall be subject to the inspection and approval of the Secretary of War and the Secretary of the Interior: *And provided further*, That the total cost of said building shall not exceed four million dollars exclusive of appropriations heretofore made.

The *Sundry Civil Act of March* 2, 1889 (25 Stat. L., 939, 966), contains the following provisions:

For the building for the Library of Congress, as authorized by the sundry civil appropriation, act approved October second, eighteen hundred and eighty-eight, except as herein modified, and for each and every purpose connected therewith, five hundred thousand dollars. And said building shall be constructed in accordance with the plans marked "D," submitted by the Chief of Engineers with his annual report to Congress, being Miscellaneous Document Num'.r Twelve, Fiftieth Congress, second session, and at a total cost therefor not exceeding five million five hundred thousand dollars exclusive of appropri-

> ations heretofore made, and no changes or modifications shall be made that will increase the cost above the limitation herein prescribed: *Provided*, That contracts may be entered into for all the stone required for the exterior walls of said building to be paid for as appropriations may from time to time be made by law.

The commission created by the act of 1873 advertised for architectural plans or sketches in August of that year. (Record 3, Finding III.) It was proposed to pay $1,500 "for such design as may be adjudged best by the commission." (Id.)

In pursuance of this proposition the claimants submitted plans which were accepted over all other competitors, twenty-eight in all, and they were paid the price agreed upon.

At this point there was no indebtedness on the part of the United States to the claimants. They had accepted the terms of a public advertisement, tendered their plans, and were paid therefor. They were not then employed. (*Tilley* v. *County of Cook* 103 U. S., 155, 160).

It becomes important to determine when this alleged indebtedness arose, keeping in mind the foregoing legislation of Congress, and the other general acts relating to public buildings and the method by which public officers are authorized to obligate the United States.

The next service rendered is stated by the court below (Record, page 4, Finding IV, cl. 2).

It is enough to say of this that these services may have served to enlighten "the chairman and members of the Committee on the Library," but these persons, as such,

had nothing to do with the subject under the act of 1873, and no reason is perceived why the United States should be compelled to pay for their instruction. To so hold would establish a dangerous precedent, desirable as instruction may be to such bodies in many instances.

The chairman thus instructed was a member of the commission created by the act of 1873, but it is not found that the commission ever requested these services, directed this member so to do, or even that it received the benefit thereof or used or acted in any way with reference to the drawings prepared in pursuance to this request.

These remarks apply to clauses 3, 4, 5, and 6, of Finding IV. The selection of plans was not vested in Senator Howe or this committee. It is true that by the acts of June 30, 1875, and August 15, 1876, appropriations aggregating $3,000 were made "to enable the Joint Committee on the Library of Congress to procure plans for the accommodation of the Library," but this must be deemed the limit to which Congress desired to go in educating the committee or allowing it to contract. It is to be borne in mind that this was only an advisory committee, appointed to gain information to submit to the future action of Congress, and was in no way authorized to adopt plans or construct a library building.

It would seem plain that such a committee could not incur a large debt in the name of the United States, and must be limited in its expenditure to the amount appropriated. It was the duty of the committee and its members to make no engagements beyond such appropriation, and the duty of the claimant to take notice of the limited powers of such committee.

These remarks also apply to clauses 7, 8, 9, and 10, with the exception that some of the work then done became a part of the completed plans which were adopted by the act of April 15, 1886—and readopted by the act of March 2, 1889. The money appropriated by the acts above referred to and the subsequent acts of June 8, 1880, and March 3, 1881, had been paid to the claimants, or one of them, from time to time, or so much thereof as was demanded, so far as appears from the record. These payments (Rec., 12–13) were apparently full settlements of all indebtedness at the time they were made, and the idea of other and larger demands seems to have had its birth about the time the claimant's services were dispensed with for reasons of economy.

We wish the court particularly to note the clause under date of August 23, 1882, "*for professional services up to date.*" (Finding, XIII, Rec., p. 13.)

For all these the claimants have been paid.

An examination of the findings will show that there was no contract express or implied made or entered into with the claimants or either of them, by any commission, committee, or public officer empowered to adopt plans, employ architects, or enter upon the construction of the building until the act of April 15, 1886, at which time the claimants' plans were for the first time adopted. This act did not constitute a contract, but was only a declaration of legislative intention. It might have been rescinded at any subsequent time before the parties had changed their position and entered upon the performance of the proposed work without liability on either side.

This is expressly so decided in *Tilley* v. *County of Cook* (103 U. S., 155, 160, 161.)

It is true that the court below finds (Rec., p. 6, Finding I) that claimants from 1874 gave up their private business and devoted themselves almost exclusively to "the preparation of plans above described," and that Mr. Smithmeyer traveled throughout this country and in Europe visiting different library buildings in various cities, at the request of "said joint select committee, for the purpose of obtaining information in respect to the architecture of the great library buildings of the world." This request was not authorized by Congress, and was beyond the powers of the committee. They recognized this when they made payment therefor from the appropriations heretofore mentioned as professional services instead of traveling expenses.

The truth seems to be that, encouraged by their success in the preliminary competition for architectural drawings in 1873, the claimants hoped to win the fame and consequent direct and indirect profits to accrue to them as architects of the greatest library building of the world. To enable them to win this prize they entered upon a course of study and investigation extensive and thorough in its character. They had not been appointed architects for the building, nor had their plans been approved, or adopted. They had simply won a prize for excellence of general design and received pay therefor. The fact that they had won this advantage in the start naturally caused committees appointed to consider plans, collect information for the future action of Congress, and individual

members of such committees, to turn to them for information and suggestion. They were in Washington, accessible, and without doubt devoted much time to the consideration of the subject. But all this is far short of contract relations or legal obligation.

The United States can not be required to pay, and is under no legal obligation to pay, either for the education of its members of Congress or committees of such members, or of individual citizens ambitious to hold or acquire positions of honor and trust under the Government. It is confidently submitted that the only relation of the claimants to the committees from 1873 until 1886 was of an advisory nature, for compensation. There were no relations with the United States entered into by any person or body authorized to contract until the latter date, excepting only the premium paid for excellence of design in the former year.

By the act of 1886 the plans of John L. Smithmeyer, one of the claimants, were adopted, "with such modifications as may be found necessary or advantageous without materially increasing the cost of the building."

This was not an employment of the claimants or either of them; it was at most a conclusion to build according to a given plan, and when adhered to and completed might, in the absence of other legislative provision or contract, entitle the person whose plan or other property was used to compensation therefor.

It is not contended that the United States has any legal or moral right to take the architect's skill or the citizens' property without compensation. Our contention is that

where there is a taking by the United States the compensation can only be recovered in the manner and upon the terms prescribed by Congress.

Keeping this in view, what was the situation of the parties at this time?

The claimants, or one of them, had prepared plans for a building which the United States might or might not build, but which the claimants hoped would be built; if the United States decided to erect a library building it might be according to some other plan; it was under no legal obligation to follow this one, and, in fact, it has been followed only in a general and broad sense. At that time both parties were free to act, and this was true even after the passage of the act of 1886. Congress could have rescinded its action and adopted other plans, as we have seen.

The claimants had not changed their position by reason of the act of 1886, or performed any service on the faith thereof, so as to raise an implied contract to pay, and likewise if the claimants were unwilling to accept the terms of a compensation and means of securing payment prescribed by Congress, they were under no obligations to go on. (*Tilley* v. *County of Cook*, *supra*.)

That the parties so understood their rights is obvious from the payments made on account and the contract entered into in October of 1886. (Rec., p. 9, Finding XI.)

It is insisted that by usage of the American Institute of Architects this adoption of the plans of claimants entitled them to $2\frac{1}{2}$ per cent commission on the *estimated* cost of the building. No such usage is proven or found by the

court below. The finding is upon the actual cost, not proposed cost. (Rec., p. 8, Finding IX.) It is true that in Finding X, Rec., p. 9, the statement is made that this percentage is allowed upon the *proposed* cost of the work, but in the same sentence reference is made to "the schedule set forth in the preceding finding" and an examination of that schedule shows that actual cost is the measure. Proposed cost is considered only for the purpose of preliminary payments to be credited upon the entire fee which is based upon the actual cost. No specifications were ever prepared by the claimants and it was not known even of what material the building would be constructed. (Rec., p. 9, Finding X.)

The actual cost is unknown at this time, and hence the fee cannot be computed on that basis. Its estimated cost, if the question of the right of an installment payment was at issue, and the usage of the American Institute of Architects was held applicable, might be important. But we have here to do with an action for the final settlement of the reasonable value of certain uncompleted plans and specifications, partially adopted by the Congress, then rejected, then adopted, and now being used in part only. (Act March 2, 1889, *supra*. Finding VII, Rec., p. 7.)

Congress had done nothing but adopt the claimants' plans and appropriate money to commence the construction of the building, which was done in October, 1886 (Finding VI, Rec., p. 6). On the first day of that month the claimant John L. Smithmeyer was appointed Architect of the Library building at an agreed compensation of $5,000 per annum (Finding XI, Rec., p. 9; additional Finding I, Rec., p. 14). It is distinctly found that at the

date of such appointment and acceptance the claimants "did not notify either Congress or the Commission that they intended to charge according to the schedule of the institute for the plans furnished, nor did they so notify Congress or the Commission before the work began on the building under the act of 1886, but had previously notified the chairman of the joint select committee that they intended to charge for the plans."

In view of the fact that the joint select committee had no power in the premises, the importance of this declaration to a stranger to the purposes thereof is not perceived. At any rate it is confidently submitted that the acceptance of employment as architect of the building at the outset, before either party had changed position or acted upon the faith of a different understanding, at an agreed compensation, leaves no room for implying any other contract or usage.

There is no room for an implied contract, because there is an express one. This is so plain that had a cross appeal been taken in behalf of the United States and the act of October 2, 1888, not been passed, the claimants would not have been entitled to any recovery. As architects it would have been their duty to furnish plans, which the court must have held that they had done, under the facts found, at an agreed compensation. The case would then have differed in no way from the employment of a lawyer by a public body; its committees may have consulted him from time to time as to legal rights and remedies, under circumscribed powers as to expenditure of money, of which he had notice, and for which services he is paid by the committees.

His investigations in that connection may have developed into a complete brief or legal argument, which fully meets the approval of the principal, the public body, which may pass a resolution to employ him, and declare that it adopts the views of such brief as its rule of future conduct in the business in hand.

Let us assume that a million dollars is involved, and that by the rules of the American Bar Association, and also in the absence of contract, by custom or usage the fee for similar services would be five per centum of the amount involved. But let us also suppose that before either party proceeded further in the business a contract is entered into by which the lawyer engages to act as such at an agreed compensation of $5,000 per annum, and as such delivers his brief to his client, who, by reason of the accepted employment, has become entitled to his service and knowledge.

He would be a rash man who would assert in this court the right of the lawyer to recover, notwithstanding the contract, the fee prescribed by the rules of the American Bar Association or by the custom or usage of the profession. And, yet, this is the case at bar. Substitute architect for lawyer plans for brief and American Institute of Architects for American Bar Association, and the present case is stated. Aside from the bounty of Congress there could have been no recovery. The claimants had no right of action. They could have recovered nothing in the Court of Claims in which they had no standing.

In this condition of affairs the act of 1888 was passed by which it was provided that all work, except as therein

provided, should be discontinued, and "all contracts for work or materials not necessary for the execution of the work contemplated herein are hereby rescinded."

> And all loss or damage occasioned hereby or arising under said contracts, together with the value of the plan * * * may be adjusted and determined by the Secretary of the Interior, to be paid out of the sums heretofore or hereby appropriated.

It needs no argument for the proposition that the act of 1888 imposed a duty upon the Secretary of the Interior; and that the word "may" in the act means "shall." By imposing this duty upon the Secretary of the Interior, Congress constituted that official a special tribunal to adjust and determine the equitable right of appellants for the value of this plan—which in law was not a claim before this time either by contract or statute. The act also provided an appropriation for the payment of any award the Secretary might make. In the first place it is a general principle of law that there can be no right of action until a default occurs. Can this court say the United States refused to pay for the plan named in the act of 1888 when it affirmatively appears that the Secretary of the Interior never had an opportunity to make payment? He had the money for that purpose and it must be presumed would have adjusted the claim had it been presented. Any other presumption involves disregard of official duty on the part of the Secretary.

If such a practice is allowable, then when a claimant has recovered a judgment against the United States and Congress has appropriated the money to pay the same, the judgment creditor could sue again upon the record and so

ad infinitum. In dealing with the United States the claimants must be held bound to seek out the proper officer and present their demands, and not put upon the Government the duty of finding them and making tender.

Finding XIV says:

> The claimants have not submitted any demand to the Secretary of the Interior under the provisions of the act of October 2, 1888, above cited, for adjustment and determination.

In view of this finding and the provisions of the act cited we respectfully suggest that the Supreme Court has no jurisdiction to entertain this appeal.

In the case of *Meade* v. *The United States* (2 C. Cls. R., 228), which, on appeal, was affirmed by this court (9 Wall., 691), the following well-settled doctrine was stated (we quote from the first syllabus of the report):

> But where a special mode of obtaining compensation is designated by statute or by treaty or where the power of assessing or deciding is lodged in a special tribunal, the remedy designed can alone be pursued, and no action can therefore be maintained in this court.

This doctrine rests on the principle that—

> If an affirmative statute which is introductive of a new law direct a thing to be done in a certain manner, that thing shall not, even although there are no negative words, be done in any other manner. (Dwarris on Statutes, 641. 1 Am. Railway Cases, 206; 1 Fost., 359. *Bloodgood* v. *The M. & H. R. R. Co.*, 14 Wend., 51. *Beekman* v. *Saratoga & S. R Co.*, 3 Paige, 45.)

It has always been held in such cases that the jurisdiction of the special tribunal is exclusive and that the remedies designated in the statutes are exclusive of common law-actions or other modes of redress. (*Mason* v. *Kennebec R. R. Co.*, 31 Maine, 215. *Stowell* v. *Flagg*, 11 Mass., 364. *Cushing* v. *Baldwin*, 4 Wend., 667. *London & N. W. R. Co.* v. *Bradley*, 3 Eng. L. and Eq. R., 104. *Know* v. *Germantown R. R. Co.*, 5 Wheat., 256. *Rogers* v. *Bradshaw*, 29 John., 735.)

These authorities are all cited in the opinion of the court in the Meade case in sustaining the doctrine. And that court, in the language of the opinion, which applies in all respects to the act of October 2, 1888, said:

> No appeal was given, no power of revision lodged anywhere, in any person or tribunal, and their decision was therefore necessarily the conclusion of the whole matter. We are not left without precedent of the highest authority upon this great question. A case most closely resembling this in its principles and history is that of *De Bode* v. *Regina* (3 Clarke's Ho. of Lords Rep., 449).

The Court of Claims proceeded to give a succinct history of that case and of a like case, *Comegys* v. *Vasse* (1 Pet., 193), decided by the Supreme Court.

The contention for claimants is that Congress did not intend to take away from them their remedy in the Court of Claims, but only to afford them a more speedy one which they might accept or decline.

We submit that the statute is not susceptible of such construction. It would require express words to save the judicial remedy if any they had. But without this, the

appellants had no case for the Court of Claims. It was because of this defect that Congress out of bounty gave them a remedy before a special tribunal—one that was familiar with the facts of the case.

The court below found that the appellants never made a a claim before that tribunal either for fees or for the value of their plan, nor to any officer of the Executive Department; and that after Congress had accepted the plan and before work had commenced under the building commission, Mr. Smithmeyer, on October 1, 1866, entered into contract with the commission to perform the duties of architect of the building, at a fixed salary of $5,000 per annum, and that on the 13th of November following, his partner, Mr. Pelz, entered into a contract with the same commission to perform the duty of principal draftsman for the building; and further, that neither appellant had ever made any demand for fees or other compensation for the plan accepted, either to the building commission or to Congress.

The act gives them a right to be paid the value of the plan, not *plans*, as counsel erroneously assert, when the Secretary of the Interior should make an award therefor, and not until then.

Hence we respectfully insist that although that act most bountifully provides that appellants should be paid the full value of the plan which Congress then deemed too expensive to be proceeded with, and although the Court of Claims has general jurisdiction of all claims founded upon any law of Congress, nevertheless it is conclusive, according to firmly established doctrine, that this claim of appellants was referred to the Secretary of the Interior

alone as a special tribunal, with exclusive powers not only to make an award thereon but with power also to pay the award.

It has become settled law that the United States can only be sued by its consent. It should be understood that demands against the Government are enforceable only in the manner and to the extent of such consent. When, therefore, these claimants were made the subjects of the bounty of Congress, or a particular method was provided for their payment, or the payment of one of them, that method was exclusive and they had no right to appeal to the courts.

We therefore confidently submit that a want of jurisdiction appears upon the face of the record, which requires that the judgment below shall be reversed, and the cause remanded with directions to dismiss the petition.

It is insisted that no liability beyond the agreed compensation of $8,000 jointly existed on the part of the United States until the act of October 2, 1888, which required the Secretary of the Interior to ascertain and pay the value of the plan named in the act. It is submitted that the rule of the American Institute of Architects has no application, because necessarily that rule has application to the general practice of the profession in competition with all other architects and subject to the vicissitudes of business. It can have no reference to cases where the architect is upon salary and engaged in the service of the Government or its committees, as the court in effect has found the claimants were, at first with the committees and later of the commission, by express contract.

Nor is any clue for the proper measure of damages afforded by the finding that the cost of plans and specifications in the office of the Supervising Architect of the Treasury is 2½ per cent of the cost of building. (Finding XI, Rec., p. 10.) This refers to average cost, and necessarily the cost is proportionately much larger on small buildings than on large. It involves almost as much labor and skill to design a building costing $50,000 as one costing $5,000,000; not as much, but the ratio of services to cost is much larger in the first than in the second case. It is apparent that to produce that average the percentage on large buildings must be less than on small buildings. As the issue here was not the average value of services, but their value for this particular structure, which has no counterpart, and is therefore not the subject of any law of usage, it is respectfully submitted that there is no reason for applying that measure or the rules of the American Institute of Architects. At least, in view of the situation of the parties and their relations, it is submitted that there is nothing to show that the amount awarded is not a fair measure of the value of the plan.

We have not felt called upon to follow counsel in the discussion of those general principles of the law of contract set forth at such length in their briefs. The correctness of the law as quoted is not denied. In fact the most of it is accessible in the leading text-books on the subject of contracts. Its applicability to the case at bar is denied, and it is respectfully insisted that upon the facts found, either there was no jurisdiction in the Court of Claims, and the judgment should therefore be reversed, or there is no